89-1074

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

FAIRCHILD INDUSTRIES, INC.,
Petitioner,

VS.

DIANE MILLER AND PAMELA LEWIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents' claims of discharge in retaliation for pursuing a charge of discrimination with the Equal Employment Opportunity Commission are actionable under the Civil Rights Act of 1866, 42 U.S.C. § 1981, in light of the decision of this Court in *Patterson v. McLean Credit Union*?

2. Whether the Seventh Amendment precludes the application of the doctrine of collateral estoppel to issues underlying legal claims, where, due to the procedural posture of the case, identical issues underlying equitable claims were adjudicated by the court in equity prior to the time the legal claims could be submitted to the jury?

RULE 28.1 LIST

The common stock of petitioner, Fairchild Industries, Inc., is 90% owned by Banner Industries, Inc. All of the subsidiary corporations of petitioner are wholly-owned by petitioner.

The following is a list of those corporations in which Banner Industries, Inc. owns an equity interest of 5% or more but less than 100% of the voting stock:

Ketchum & Co., Inc.
Keystone Camera Products Corporation
Rex-PT Holdings Inc.
Thompson Aircraft Tire Corporation (Asia) Ltd.
Aero International France, S.A.R.L.
McGill Manufacturing Company, Inc.

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The petitioner, Fairchild Industries, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on September 19, 1989.

OPINION BELOW

The first opinion of the United States Court of Appeals for the Ninth Circuit after trial was reported at 876 F.2d 718 (9th Cir. 1989), and is reprinted in the appendix hereto, p. 1a, *infra*.[1] The opinion of which petitioner seeks review is reported at 885 F.2d 498 (9th Cir. 1989) and is

[1]The earlier opinion of the Ninth Circuit reversing summary judgment and remanding the case for trial, reported at 797 F.2d 727 (9th Cir. 1986), is not addressed by this petition.

reprinted in the appendix, p. 39a, *infra*. The latter opinion amends and supersedes the former opinion following the Ninth Circuit's Denial of Rehearing and Rehearing En Banc on September 19, 1989. The opinion of the United States District Court for the Central District of California was not reported. It is reprinted in the appendix hereto, p. 79a, *infra*.

JURISDICTION

Respondents' appeal after trial was first decided by the Court of Appeals for the Ninth Circuit on May 23, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed by petitioner on July 6, 1989. Said petition was denied on September 19, 1989, however, the Ninth Circuit at that time amended its opinion. This Petition for a Writ of Certiorari was filed within 90 days of the latter disposition by the Ninth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).[2]

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> Section 1981. Equal rights under the law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment,

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[2]The fact that the circuit court remanded this action for new trial does not bar this Court from granting this petition. *United States v. General Motors Corp.*, 323 U.S. 373, 377, 65 S. Ct. 357, 359 (1945).

pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

United States Code, Title 42:

Section 2000e-3(a). Other unlawful employment practices. Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

California Government Code:

Section 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions.

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or other-

> wise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

STATEMENT OF THE CASE

Respondent Lewis was formerly employed in petitioner's Engineering Department as a junior designer. Respondent Miller was formerly employed in petitioner's Contracts Department as a contracts administrator. At the time of their employment in said positions, respondents were the only blacks in their respective departments.

Prior to September 1982, respondents filed separate EEOC charges against petitioner, alleging race and sex discrimination.[3] Petitioner denied the charges, and separate EEOC fact-finding conferences were held with each respondent. These fact-finding conferences resulted in separate settlements of both charges. In connection with the settlements, the parties' entered into separate no-fault settlement agreements which provided, among other things, that (a) respondent Lewis would be allowed to begin CAD/CAM training and attend subsequent courses, and (b) respondent Miller would be provided equal opportunity for training with similarly situated employees. The no-fault agreements were expressly integrated:

> "This agreement constitutes the complete understanding between Respondent, Charging Party and the Equal Employment Opportunity Commission. No

[3]Respondent Lewis alleged discriminatory denial of training opportunities, and respondent Miller alleged discriminatory assignment to an inferior work station and denial of a merit increase.

other promises or agreements shall be binding unless signed by these parties."

Following the settlements, respondent Lewis began training courses as provided by her settlement agreement. However, with regard to Miller, no training for contract administrators existed at the time.

During the fourth quarter of 1982, and approximately two months after the settlements were entered, respondents were laid off in connection with an economically-driven reduction-in-force. During that period, twenty-eight employees were laid off. Additional layoffs continued into 1983.

Respondents filed this lawsuit on May 27, 1983, asserting that they had been laid off in retaliation for filing EEOC charges in violation of the following statutes: (1) the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) ("Title VII"), and (3) the California Fair Employment and Housing Act, Cal. Govt. Code § 12940(f) ("CFEHA").[4] On November 26, 1984, petitioner's motion for summary judgment was granted as to all of respondents' claims. However, on August 12, 1986, the Ninth Circuit reversed and remanded the case for trial. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986).

A jury trial commenced on May 5, 1987. At the conclusion of respondents' case-in-chief, petitioner moved for (1) dismissal of the Title VII retaliation claims pursuant

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[4]In addition to the statutory claims, respondents asserted a variety of state common law claims, including that petitioner breached the EEOC Settlement Agreements by terminating respondents' employment before they could take full advantage of training opportunities. Respondents' common law claims are not addressed by this petition.

to Federal Rule of Civil Procedure ("FRCP") 41(b), and (2) for a directed verdict with respect to the remainder of the causes of action pursuant to FRCP 50(a). The district court denied petitioner's motions without prejudice to their renewal at the close of all the evidence.

During its case-in-chief, petitioner presented substantial evidence that respondents were selected for layoff not because they had filed EEOC charges, but rather because, as respondents admitted, they were the least-experienced, least-skilled employees in their respective departments. After all parties had rested, petitioner renewed its motions for dismissal and directed verdict.

At that time, the district court found that there was insufficient evidence upon which a jury could find for respondents on their Section 1981 and CFEHA claims, and thus directed verdicts against those claims. The district court then adjudicated respondents' Title VII claims as the trier of fact, concluding that respondents had failed to meet their burden to establish retaliatory discharge. Accordingly, the district court dismissed respondents' Title VII claims pursuant to FRCP 41(b). Judgment was entered accordingly on July 7, 1987.

On August 21, 1987, respondents filed their Notice of Appeal from the judgment. On May 23, 1989, the Ninth Circuit held that the district court had erred in directing verdicts on respondents' Section 1981 and CFEHA claims, stating:

> "Although we recognize that Fairchild presented substantial evidence in support of its explanation for the discharges, we conclude that the district court erred in finding that Miller and Lewis presented 'absolutely no evidence of pretext.' Moreover, the court erred in directing a defense verdict on the

> Section 1981 and CFEHA claims based upon finding that no reasonable juror could find retaliation."

Miller v. Fairchild, 876 F.2d at 724 (repeated at 885 F.2d at 505.)

However, the Ninth Circuit initially *affirmed* the district court's dismissal of the Title VII claim, stating:

> "[A]s the trier of fact on the Title VII claim, the court was entitled to weigh the evidence and evaluate witness credibility. *See* Fed.R.Civ.P. 52(a); *United States v. Smith,* 625 F.2d 278, 279-80 (9th Cir. 1980). Fairchild presented significant evidence that its declining economic condition necessitated the appellants' layoffs, which the court was entitled to weigh against Lewis and Miller's evidence of pretext." 876 F.2d at 726.

Thus, the Ninth Circuit initially remanded the case for a new trial solely on respondents' Section 1981, CFEHA, and related state common law claims. *Id.*

On June 6, 1989, petitioner filed with the Ninth Circuit a Petition for Rehearing and Suggestion for Rehearing *En Banc.* Petitioner argued that since the Ninth Circuit had affirmed the district court's findings on respondents' Title VII claims, those findings should collaterally estop retrial of respondents' Section 1981 and CFEHA claims, as those latter claims were based on facts already adjudicated by the district court under Title VII. In support of its argument, petitioner relied upon this Court's decision in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979), and the Fourth Circuit decisions of *Ritter v. Mount St. Mary's College,* 814 F.2d 986 (4th Cir.), *cert.*

denied, 108 S.Ct. 260 (1987) and *Dwyer v. Smith,* 867 F.2d 184 (4th Cir. 1989).[5]

In their opposition to the petition for rehearing, respondents argued for the first time that when a plaintiff has been denied the right to a jury trial because of the erroneous dismissal of legal claims, a concurrent finding by the court on equitable Title VII claims must be vacated pending retrial of the erroneously dismissed legal claims. Respondents suggested that if rehearing was granted, it should be limited to that issue.

In its order of September 19, 1989 on the petition for rehearing, the Ninth Circuit reconsidered and reversed its earlier decision that the district court had properly determined the Title VII claims. *Miller v. Fairchild,* 885 F.2d at 506-506. In its amended opinion, the Ninth Circuit held that, notwithstanding the existence of substantial evidence supporting the district court's Title VII findings, the district court's judgment must nevertheless be vacated and remanded for retrial. The Ninth Circuit further held that on remand: "[T]he district court in deciding the Title VII claim will be bound by all factual determinations made by the jury in deciding the Section 1981 and CFEHA claims." *Id.* at 507. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was otherwise denied.

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[5]The other reasons for which petitioner sought rehearing *en banc* are not addressed in this petition.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's decision to remand the Section 1981 claim based on retaliatory discharge conflicts with (A) this Court's decision in *Patterson v. McLean Credit Union*, (B) the decision of another panel within the Ninth Circuit itself applying *Patterson*, and (C) the decisions of a majority of other courts outside the Ninth Circuit applying *Patterson*.

A. The Ninth Circuit decision in this case directly conflicts with *Patterson*.

Respondents' Section 1981 claims are based on their allegations that they were laid off by petitioner in retaliation for having filed charges with the EEOC.[6] In *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), this Court

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[6]This Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989) was rendered on June 15, 1989. The trial on respondents' claims, the appeal, and the filing of the Petition for Rehearing all occurred prior to this Court's decision in *Patterson*. Prior to *Patterson*, Ninth Circuit cases uniformly recognized a cause of action under Section 1981 for retaliatory discharge. *See e.g. Mitchell v. Keith*, 752 F.2d 385 (9th Cir. 1985) (Section 1981 action for discharge in retaliation for EEO activity); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 733 (9th Cir. 1986) ("Plaintiffs may seek relief under both Title VII and Section 1981."); *Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041 (9th Cir. 1987) (same); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (same). Thus, the propriety of the Section 1981 cause of action was not addressed by the parties during the proceedings below. This petition is the first opportunity that the parties have had to brief the application of *Patterson* to the Section 1981 claim asserted in this case. This Court is thus not precluded from granting this petition simply because it raises and issue not presented below. *See Carlson v. Green*, 446 U.S. 14, 17, n.2, 100 S.Ct. 1468, 1470 n.2 (1980).

considered the scope and meaning of Section 1981 in the employment context, and held that Section 1981 only proscribes racial discrimination with respect to the rights expressly enumerated therein. *Patterson,* 109 S.Ct. at 2372. These rights are:

(1) the right to make a contract, which encompasses formation issues only; and

(2) the right to enforce a contract through legal process. *Id.,* 109 S.Ct. at 2372-2373.

As such, this Court held that "conduct by the employer after the contract relation has been established, *including breach of the terms of the contract",* is not actionable under Section 1981 as such conduct does not implicate either formation issues or enforcement issues, but rather involves performance issues which may be redressed under Title VII and/or state contract law. *Id.,* 109 S.Ct. at 2373 (emphasis added).

The Ninth Circuit's decision in this case to remand respondents' Section 1981 claims for jury trial conflicts directly with *Patterson.* It is evident that respondents' claims involve neither contract formation nor contract enforcement issues.

As this Court explained, contract formation issues under Section 1981 involve allegations of either (a) a refusal to enter into a contract for discriminatory reasons, or (b) the insistence upon discriminatory terms in the making of a contract. *Patterson,* 109 S.Ct. at 2372. Respondents' claims involve neither of these allegations.

The record in this case establishes that respondents were not prevented from entering into the EEOC settlement agreements at issue. Further, respondents have never claimed that petitioner insisted that discriminatory terms be included in the EEOC settlement agreements.

Accordingly, the first right protected by Section 1981 is not implicated by respondents' claims.

Nor can respondents' discharge be interpreted as interference with their rights to enforce their contracts. As this Court explained in *Patterson:*

> "[The right to enforce contracts] embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.... *The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.*"

Id., 109 S.Ct. at 2373 (emphasis added). With respect to private employers, this Court further explained that Section 1981 is intended to reach "*private* efforts to impede access to the courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations". *Id.* at 2373 (emphasis in original).

Respondents herein have not claimed that petitioner has impeded their access to the courts. Indeed, the fact that this action exists establishes that respondents have had unencumbered access to the courts to seek enforcement of their alleged rights under their EEOC settlement agreements.

In sum, respondents' retaliatory discharge claims implicate neither the contract formation nor the contract enforcement rights protected by Section 1981. Therefore, this petition should be granted to correct the Ninth Circuit's decision which is in direct conflict with *Patterson.*

B. The Ninth Circuit decision in this case conflicts with the decision of another panel within the Ninth Circuit itself applying *Patterson*.

Two weeks *prior* to the filing of the amended opinion in this case, a different panel of the Ninth Circuit, in *Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) (Wallace, Farris and Beezer, Circuit Judges), applied the *Patterson* decision to reach a result directly opposite to that reached in this case.

In *Overby,* the plaintiff alleged he was discharged from his employment in retaliation for filing a charge of race discrimination with the EEOC, a claim identical to those at issue herein. The *Overby* panel concluded that this claim did not implicate plaintiff's right to make a contract, nor his right to enforce the contract through legal process. Thus, following *Patterson,* the *Overby* panel held that the claim was not actionable under Section 1981. *Id.* at 473. In so holding, the *Overby* panel took heed of the concern expressed by this Court in *Patterson* that if the meaning of Section 1981 was stretched to protect conduct already covered by Title VII, then plaintiffs would, in effect, be permitted to circumvent Title VII's detailed statutory scheme and thus thwart Title VII's conciliatory goals. *Id.* The *Overby* panel noted that retaliatory discharge is specifically proscribed by Title VII and, as such, the concerns expressed by this Court in *Patterson* were directly implicated. *Id.*

Notwithstanding that the *Overby* decision came down two weeks prior to the amended decision in the case at bar, the Ninth Circuit panel in this case made no mention of *Overby* in reaching its conflicting decision to remand the Section 1981 claims for trial. Therefore, in addition to the other reasons stated, this petition should also be granted to resolve the split within the Ninth Circuit itself

as to the application of *Patterson* to retaliatory discharge cases.

C. The Ninth Circuit decision in this case conflicts with the decisions of a majority of other courts outside the Ninth Circuit applying *Patterson*.

A majority of the lower courts that have had occasion to apply the *Patterson* decision to claims of discriminatory discharge brought under Section 1981 have concluded that such claims are not actionable for the reasons stated above. *See, e.g., Malekian v. Pottery Club of Aurora, Inc.*, No. 89-B-632, Slip Op. 1989 U.S. Dist. Lexis 13687 (D. Colo. 1989); *Zeiour v. Chevron U.S.A., Inc.*, No. 87-4039, Slip Op., 1989 U.S. Dist. Lexis 13656 (E.D. La. 1989); *Alexander v. New York Medical College*, 721 F.Supp. 587 (S.D.N.Y. 1989); *Morgan v. Kansas City Area Transportation Authority*, 720 F.Supp. 758 (W.D. Mo. 1989); *Rivera v. AT&T Information Systems, Inc.*, 719 F.Supp. 962 (D. Colo. 1989); *Hall v. County of Cook*, 719 F.Supp. 721 (N.D. Ill. 1989); *Greggs v. Hillman Distributing Company*, 719 F.Supp. 552 (S.D. Tex. 1989).

The Ninth Circuit's decision in this case to remand respondents' Section 1981 claim based on discriminatory discharge directly conflicts with the reasoning and results of those cases. Since the issue of whether retaliatory discharge is actionable under Section 1981 is squarely presented by this case, this Court should grant this petition to answer the question, provide needed guidance to the lower courts and resolve the developing conflict in the application of the *Patterson* decision.[7]

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[7]Other district courts have attempted to sidestep *Patterson* by concluding that discriminatory discharge *does* impact contract formation or contract enforcement issues, and thus, reach the same result as did the Ninth Circuit in this case. *See e.g., Carroll v. Elliott*

II.

The Ninth Circuit's decision to vacate the District Court's Title VII judgment and to remand the claim for a binding jury determination based on the jury's adjudication of respondents' state law claims: (A) ignores the teachings of this Court's decision in *Parklane Hosiery Co. v. Shore* concerning the interplay between the doctrine of collateral estoppel and the scope of the Seventh Amendment right to trial by jury, where, due to the procedural posture of the case, equitable issues have been adjudicated in the same case prior to submission of the legal claims to the jury; and (B) conflicts directly with the decision of the Fourth Circuit in *Lytle v. Household Manufacturing, Inc.*, to which this Court has granted certiorari to review an issue nearly identical to that presented here.

A. The Ninth Circuit decision ignores the teachings of *Parklane*.

The Ninth Circuit initially held that the district court's determination of respondents' Title VII claims was proper. However, when the collateral estoppel effect of the Title VII ruling on the subsequent retrial of respondents' Section 1981 and CFEHA claims was pointed out to the Ninth Circuit, the Court reversed itself and vacated and remanded the Title VII judgment, directing that "on

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Personnel Services, Inc., No. H-89-1918, Slip Op. (D. Md. 1989) (racially discriminatory firing may be asserted under Section 1981); *Booth v. Terminix International, Inc.*, 722 F.Supp. 675 (D. Kan. 1989) (same); *Padilla v. United Airlines*, 716 F.Supp. 485 (D. Colo. 1989) (same). These courts have continued to allow Section 1981 claims to be premised on discriminatory discharge. This apparent confusion among the district courts concerning the scope of *Patterson* is yet another reason why this petition should be granted.

remand, the district court in deciding the Title VII claim will be bound by all factual determinations made by the jury [on retrial of] the Section 1981[8], and CFEHA claims." *Miller,* 885 F.2d at 507 (footnote added).

The Ninth Circuit's about-face on its initial holding was obviously based on a sub silentio choice between seemingly competing interests — a choice to negate the jurisprudential interest of affording collateral estoppel effect to the district court's factual determinations made previously on the equitable Title VII claims, and instead to advance respondents' interests in trying their legal claims to a jury despite the prior adjudication. However, this choice does not comport with this Court's decision in *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979).

In *Parklane,* the issue of whether giving collateral estoppel effect to an equitable determination in a subsequent legal action would violate the Seventh Amendment was squarely presented. In discussing the issue, this Court pointed out that the Seventh Amendment only preserves the right to jury trial to the same extent that such a right existed at common law as of the time the Bill of Rights was ratified. *Parklane,* 439 U.S. at 333, 109 S.Ct. at 652. At that time, litigants did not have a right to a jury determination of issues previously adjudicated by a

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[8]It is now clear that, based on *Patterson,* respondents are not entitled to a trial on their Section 1981 claims. See Section I, *supra.* Thus, the sole remaining discrimination claims at issue are respondents' retaliation claims under state statutory law, i.e., the CFEHA claims.

chancellor in equity. *Id.*[9] Therefore, this Court concluded that:

> " '[T]he Seventh Amendment preserves the right to jury trial only with respect to issues of fact, [and] *once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury.*' "

Parklane, 439 U.S. at 325, 99 S.Ct. at 648 (emphasis added). *See also Ex Parte Peterson,* 253 U.S. 300, 310, 40 S.Ct. 543, 546 ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined.") Accordingly, this Court held that, because there is no right to relitigate before a jury issues which have been fairly and fully litigated previously in equity, affording collateral estoppel effect to prior equitable determinations in no way violates the Seventh Amendment. *Parklane,* 439 U.S. at 335, 99 S.Ct. at 653.

However, despite this Court's *Parklane* decision, there exists a split between the circuit courts over the interplay between collateral estoppel and the right to jury trial where legal and equitable claims are presented in the same case and where, due to the procedural posture of the case, the equitable claims have been adjudicated prior to the legal claims.[10] This split has resulted from differing

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[9] *See also Hopkins v. Lee,* 6 Wheat. 109; *Smith v. Kernochen,* 48 U.S. 198 (1849).

[10] To petitioner's knowledge, only three circuits have specifically addressed this issue subsequent to this Court's decision in *Parklane* — the Fourth, Seventh, and now the Ninth Circuit in this case. *See Ritter v. Mount St. Mary's College,* 814 F.2d 986, 991 (4th Cir.) *cert. denied,* 108 S.Ct. 260 (1987) ("*Parklane* decided that the judicial interest in the economical resolution of cases, which interest under-

applications of this Court's pronouncements in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948 (1959) and *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894 (1962).

In *Beacon Theatres* and *Dairy Queen,* this Court fashioned the general rule that when legal and equitable claims are joined in the same action, the legal claims should ordinarily be adjudicated prior to the equitable claims to preserve the right to a jury trial. However, as was pointed out by this Court in *Parklane,* the broad principle set forth in *Beacon Theatres* and *Dairy Queen* was no more than "a general prudential rule", not a rigid mandate. Indeed, in *Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467 (1966), this Court specifically permitted a judge sitting in equity to adjudicate equitable claims *prior* to legal claims.

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lies the doctrine of collateral estoppel, does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity."); *Dwyer v. Smith,* 867 F.2d 184 (4th Cir. 1989) (same); *Lytle v. Household Manufacturing, Inc.,* No. 86-1097, Slip Op. (4th Cir. 1987). This Court has granted certiorari to review the *Lytle* decision on this issue. 109 S.Ct. 3239, 106 L.Ed.2d 587 (1989). *Contra, Volk v. Coler,* 845 F.2d 1422, 1438 (7th Cir. 1988) ("We cannot sanction an application of collateral estoppel which would permit findings made by a court in an equitable proceeding to bar further litigation of a legal issue that had been properly joined with the equitable issue when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim") *Hussein v. Oshkosh Motor Truck Co.,* 816 F.2d 348, 354-55 (7th Cir. 1987) (same). In addition, two cases addressed this issue prior to the *Parklane* decision. *See Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674, 690 (9th Cir.), *cert. denied,* 429 U.S. 940, 97 S.Ct. 355 (1976); *Heyman v. Kline,* 456 F.2d 123, 131 (2nd Cir.) *cert. denied,* 409 U.S. 847, 93 S.Ct. 53 (1972). However, since these cases were decided without the benefit of this Court's *Parklane* decision, they are not authoritative.

In short, *Parklane* and *Katchen* teach that the *Beacon Theatres/Dairy Queen* rule was not intended to be followed slavishly. Rather, *Beacon Theatres* and *Dairy Queen* themselves:

> "recognize[d] that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim."

Kathen, 382 U.S. at 339, 86 S.Ct. at 478.

Following this Court's explanation in *Parklane* of the scope of the *Beacon Theatres/Dairy Queen* rule, the Fourth Circuit in *Ritter* concluded that where, as here, due to the procedural posture of the case, the court in equity previously has adjudicated issues common to legal claims presented in the *same case,* collateral estoppel will prevent retrial of those issues.

In *Ritter,* the district court summarily dismissed the plaintiff's ADEA and EPA jury claims before trial based on its conclusion that the ADEA and EPA did not regulate the defendant, a religious institution. Following a trial on the merits of the Title VII claim, the district court adjudicated the Title VII claim against the plaintiff. *Ritter,* 814 F.2d at 989. On appeal, the Fourth Circuit reversed the district court's dismissal of the jury claims, holding that the district court had erred in concluding that the ADEA and EPA did not regulate religious institutions. However, on remand the district court granted summary judgment dismissing plaintiff's ADEA and EPA claims based on the collateral estoppel effect of its prior Title VII adjudication of the common issues. The Fourth Circuit affirmed the dismissal, stating:

> "It would be absurd to say that the requirement of a 'prior suit' means that the facts found in a single

> case cannot bind the parties in that same case. Indeed, if the parties were not bound by the facts found in the very same case which they were litigating, then the judgments of courts issued during trial would become irrelevancies."

Ritter, 814 F.2d 986 at 992. *Accord, Dwyer v. Smith,* (the erroneous dismissal of plaintiff's Section 1983 jury claim before the verdict was harmless error, since the district court's factual findings on the equitable Title VII claim would collaterally estop any subsequent litigation of the plaintiff's Section 1983 claim).

However, the Seventh Circuit in *Volk v. Coler,* has reached the opposite conclusion. In *Volk,* the plaintiff alleged various sex discrimination claims under 42 U.S.C. Sections 1983 and 1985(3) against her former supervisors, and also a Title VII claim against her employer based on the supervisor's conduct. *Volk,* 845 F.2d at 1424-1425. After all the evidence, the district court directed verdicts against plaintiff on her Section 1983 and Section 1985(3) claims, and entered judgment for the employer on the Title VII claim. *Id.* at 1425.

On appeal, the Seventh Circuit concluded that the district court had erroneously dismissed plaintiff's legal claims. *Id.* The Seventh Circuit then held that, based on ***Beacon Theatres/Dairy Queen,*** when equitable claims are adjudicated first because of an erroneous dismissal of a legal claim, the concurrent equitable adjudication not only does *not* have collateral estoppel effect on the legal claims, but itself must be *vacated* pending retrial of the erroneously dismissed legal claims. Accordingly, the Seventh Circuit vacated and remanded the Title VII claim. ***See also Hussein v. Oshkosh Motor Truck Co.,*** (same result).

The Ninth Circuit in this case has chosen to reject the approach advanced by the Fourth Circuit and, instead, to follow the view espoused by the Seventh Circuit. Thus, the Ninth Circuit in this case has mandated that the district court's adjudication of the Title VII claims *must* be reversed and remanded for a new trial and that further, on remand the district court, in deciding the Title VII claim, shall be bound by all factual determinations made by the jury in their resolution of the Section 1981 and CFEHA claims.

The Seventh Circuit's decision in *Volk v. Coler,* upon which the Ninth Circuit relies, should not be followed. The *Volk* decision errs by ignoring the sound jurisprudential policies underlying the collateral estoppel doctrine as espoused by this in *Parklane.* Indeed, the *Volk* decision fails to address or even cite *Parklane.* By giving equitable determinations preclusive effect as to issues underlying legal claims, this Court in *Parklane* recognized that when issues have been fully and fairly adjudicated by a court sitting in equity, a plaintiff does not have a protectible interest in retrying before a jury those same issues. *See also Ritter,* 814 F.2d at 991. As a result, in this context, the jurisprudential interests served by the doctrine of collateral estoppel in no way conflict or even compete with the Seventh Amendment.

In sum, the Fourth Circuit decisions of *Ritter* and *Dwyer* advance the purposes of collateral estoppel enunciated by this Court in *Parklane,* and in no sense do they undermine the Seventh Amendment. This Court should grant this petition to resolve the split in the circuit courts over the proper application of the *Beacon Theatres/Dairy Queen* rule in light of *Parklane.*

B. This Court has granted certiorari in *Lytle*, which involves an issue nearly identical to that presented by this case.

The importance of the issues raised by this case has been recognized by this Court in its recent grant of certiorari in the Fourth Circuit case of *Lytle v. Household Manufacturing, Inc.*, No. 86-1097, Slip Op. (4th Cir. 1987), *cert. granted,* 109 S.Ct. 3239 (1989). In *Lytle,* the plaintiff's action for discriminatory discharge and retaliation for filing a charge of discrimination with the EEOC was brought under both Section 1981 and Title VII. The district court dismissed the Section 1981 action and a bench trial followed on the Title VII claims. At the conclusion of the plaintiff's case-in-chief, the trial court dismissed the Title VII claim for discriminatory discharge under FRCP 41(b). Then, at the conclusion of all of the evidence, the trial court found for the defendant on the Title VII retaliation claim.

On appeal, plaintiff argued that the trial court erred in dismissing his Section 1981 claim and that he was entitled to a jury trial on that claim. However, the Fourth Circuit affirmed, holding that since the elements for a prima facie case of employment discrimination alleging disparate treatment under Title VII and Section 1981 are identical, the facts decided against appellant on the Title VII claim would also preclude relief under the Section 1981 claim. The Fourth Circuit thus held that the district court's findings in the Title VII action collaterally estopped the appellant from relitigating those findings before a jury.

This Court has granted certiorari in *Lytle* to review the collateral estoppel issue. The issue presented in *Lytle* is nearly identical to the issue presented here. As in *Lytle,* respondents herein have filed retaliation claims under

both Title VII and Section 1981. However, in this case respondents have also asserted a retaliation claim under the CFEHA based on the same facts. Petitioner contends that the district court's determination of the Title VII claim should collaterally estop any jury findings on both the Section 1981 and the CFEHA claims.

Indeed, the collateral estoppel issue in this case is even more compelling than that raised in *Lytle.* Petitioner understands that in *Lytle,* the equitable and legal claims at issue relate solely to Title VII and Section 1981. This Court could easily dispose of *Lytle* by relying on the *Patterson* decision without ever reaching the collateral estoppel issue. However, the instant case cannot be decided solely on the *Patterson* issue because respondents have also alleged retaliatory discharge under state statutory law, i.e., the CFEHA. Therefore, the collateral estoppel effect of the equitable Title VII adjudication on respondents' state law discrimination claims will be preserved despite the impact of *Patterson* on the Section 1981 claim.

Accordingly, this petition should be granted and the case set for argument.

In the alternative, petitioner respectfully requests that the Court postpone the disposition of this petition until after the Court decides *Lytle,* insofar as the *Lytle* decision will likely have a direct impact on this case.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: December 18, 1989

DIANE MILLER AND PAMELA LEWIS,
Plaintiffs-Appellants,

v.

FAIRCHILD INDUSTRIES, INC., A MARYLAND CORPORATION,
Defendant-Appellee.

No. 87-6325.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 1, 1988.

Withdrawn from Submission Aug. 2, 1988.

Resubmitted May 23, 1989.

Decided May 23, 1989.

Two black female employees brought action against employer alleging they were discharged from their employment in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission. The United States District Court for the Central District of California, James M. Ideman, J., entered summary judgment for employer, and employees appealed. The Court of Appeals, 797 F.2d 727, reversed and remanded. On remand, the District Court dismissed Title VII retaliation claim and directed verdict for employer on remaining claims. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) jury question existed as to whether employer's economic rationale was mere pretext for retaliatory discharge of employees who filed EEOC complaints; (2) jury question existed as to whether employer breached settlement agreement's implied guarantee of continued employment; and (3) jury question existed as to whether employer fraudulently induced employees to

enter settlement agreements by concealing their probable future layoffs.

Affirmed in part, reversed in part, and remanded.

1. Master and Servant — 43

Despite employer's presentation of substantial evidence in support of its explanation for discharges of employment discrimination plaintiffs, plaintiffs presented substantial evidence necessary to defeat directed verdict that employer's rationale was mere pretext and that they were more likely laid off in retaliation for filing EEOC discrimination complaints. 42 U.S.C.A. § 1981; West's Ann.Cal.Labor Code § 3201 et seq.

2. Master and Servant — 40(2)

Timing of employment discrimination plaintiffs' layoffs could be considered in determining whether employer's economic rationale was pretext for retaliation; one employee was laid off 59 days after she attended EEOC fact-finding conference and signed settlement with employer, while another was laid off 42 days after she signed her agreement. 42 U.S.C.A § 1981.

3. Master and Servant — 40(1)

In employment discrimination action, evidence that employer's management personnel who participated in decisions to lay off employment discrimination plaintiffs were aware that they had filed EEOC charges, had attended EEOC fact-finding conference and were the very people whose actions had prompted plaintiffs' complaints, supported inference of retaliation. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A § 2000e et seq.; West's Ann.Cal.Labor Code § 3201 et seq.

4. Master and Servant — 40(4)

In determining whether employer charged with employment discrimination had retaliated against plaintiffs for filing employment discrimination charges, evidence that four senior employees were transferred to delay or prevent the layoff of less skilled employees at the same time that the plaintiffs were discharged, although the same procedure was not followed to protect the plaintiffs, could be considered as evidence of retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Master and Servant — 40(4)

Evidence that manager, who subsequently resigned, told employee that after she was laid off that employee should not be surprised if she was discharged after signing EEOC settlement agreement was evidence which could be considered in establishing prima facie case of discriminatory retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Master and Servant — 40(4)

District court sitting as trier of fact on Title VII claim had sufficient evidence on which to base its finding that employer's evidence that its declining economic condition necessitated layoffs of employment discrimination plaintiffs was reason for layoffs and was not merely pretext for unlawful retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Evidence — 450(5)

District court properly admitted extrinsic evidence regarding circumstances surrounding formation of agreements to acertain parties' intent in negotiating EEOC settlement agreement, which employees claimed con-

tained implied guarantee of continued employment for reasonable period. West's Ann.Cal.Civ.Code § 1647.

8. Master and Servant — 43

Laid off employees' testimony that a purpose of settlement agreements with employer was to enable them to improve their work performance created jury question as to whether parties intended employer to provide continued employment for reasonable period; employees relinquished valuable rights to file Title VII discrimination lawsuits against employer in exchange for employer's promise to provide them training necessary to advance in company, both employees testified that they did not ask for layoff protection despite awareness of ongoing layoffs, because they did not feel personally threatened by potential discharge, and both testified they believed settlement agreements implicitly guaranteed them layoff protection. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Federal Courts — 925

Absent manifest injustice, Court of Appeals could apply rule of case decided while employment discrimination case was pending appeal to affirm directed verdict on claim for tortious breach of implied covenant of good faith and fair dealing.

10. Compromise and Settlement — 24

Jury question existed as to whether employer fraudulently induced employees to enter settlement agreements by concealing the fact that they were probable candidates for a future layoff and by making promises which the employer had no intention of performing; employees presented evidence that during settlement negotiations

employer concealed fact that employees would likely be laid off in near future, there was evidence that employer selected employees for layoff based on comparative skills assessment and employees were least skilled individuals in their respective positions, and employer failed to provide employees with promised training opportunities when it discharged them within two months after negotiating settlement agreements. West's Ann.Cal.Civ.Code § 1572.

11. Workers' Compensation — 2084

Discharged employee's claims for intentional and negligent infliction of emotional distress based on emotional distress they suffered as a result of being laid off following settlement negotiations concerning their complaints of race discrimination were not precluded by California Worker's Compensation Act. West's Ann.Cal.Labor Code § 3600 et seq.

12. Master and Servant — 41(5)

Dismissed employees could not recover punitive damages for breach of contract. West's Ann.Cal.Civ.Code § 3294(a).

13. Master and Servant — 41(5)

Discharged employees' claims for negligent infliction of emotional distress, which could be read as alleging that their former employer consciously disregarded their contract rights when it laid them off, alleged a "conscious disregard" of rights sufficient to support request for punitive damages under California law. West's Ann.Cal.Civ.Code § 3294(a, c).

14. Federal Civil Procedure — 1961

The issue of liability on intentional infliction of emotional distress claim was intertwined with damages issue and thus separate trials on liability and damages issues would tend to create "confusion and uncertainty."

15. Evidence — 442(1)

Absent any allegations that discharged employees misunderstood or were unaware of language that settlement agreement constituted complete understanding between the parties, parol evidence of some side agreement or side understanding other than that mentioned in the contract was inadmissible.

16. Damages — 178

Testimony of relatives of discharged employees was relevant to emotional distress allegedly suffered by employees as a result of employer's discharge of them shortly after they entered EEOC settlement agreement, since proof of existence of distress was critical to determination of employer's liability for negligent and intentional infliction of emotional distress.

17. Federal Civil Procedure — 2011

Testimony of experts, who failed to satisfy local court rule requiring an exchange of a short narrative statement of testimony expected to be elicited at trial and who instead provided defendant and court with only conclusory statement as to nature of proposed testimony, could properly be excluded. U.S.Dist.Ct.Rules C.D.Cal., Rule 9.4.6.

18. Customs and Usages — 10

In a negligent infliction of emotional distress case, industry custom or practice is relevant to determining the defendant's duty of care.

19. Federal Courts — 901

Exclusion of admissible evidence of employer's "unrelated" hirings, contradicting employer's claim that it was required to lay off employment discrimination plaintiffs due to its economic position, was not sufficiently prejudicial to warrant reversal of dismissal of employees' Title VII claim in light of relatively weak nature of evidence. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

20. Federal Courts — 901

Employment discrimination plaintiffs who were allowed to bring out facts that they were the only blacks in their respective departments, the only employees with settlement agreements with the EEOC, and were laid off on the same day, were not prejudiced by mere exclusion of proposed commentary as to "statistical significance" of those facts.

21. Evidence — 373(1)

Employer's chief financial officer, who supervised payroll department and testified that termination clearance document at issue was prepared by personnel department and signed by department of finance, was a "qualified person" within the meaning of the foundation requirement of the business document exception to the hearsay rule. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

22. Civil Rights — 43

Testimony as to whether employer gave its own concerns and concerns of laid off employee equal consideration was properly ruled irrelevant in employment discrimination case. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

23. Federal Courts — 903

Employer's use of leading questions in its examination of its chief financial officer was not reversible error where testimony elicited through leading questions did not substantially expand or alter testimony elicited through proper, nonleading questions. Fed.Rules Evid.Rule 611(c), 28 U.S.C.A.

Tyron J. Sheppard, Los Angeles, Cal., for plaintiffs-appellants.

Andrew C. Peterson, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before FLETCHER, PREGERSON and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

Pamela Lewis and Diane Miller appeal the district court's dismissal of their Title VII claim alleging that Fairchild Industries discharged them in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC). They also appeal the district court's dismissal of their claims for the negligent and intentional infliction of emotional distress, the directed verdict on their retaliation claims brought under 42 U.S.C. § 1981 and the California Fair Employment and

Housing Act (CFEHA), and the directed verdict on their claims for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and fraud. Finally, they appeal a number of the district court's pretrial rulings and evidentiary rulings during trial. We affirm the dismissal of the Title VII claim and the directed verdict on the tortious breach claim, but reverse the dismissal of the emotional distress claims and the directed verdict on the breach of contract, fraud, Section 1981, and CFEHA claims. We remand for a new trial.[1]

BACKGROUND

Fairchild Control Systems, Inc., a division of Fairchild Industries, is primarily a government contractor. At the time of their discharge, Diane Miller worked for Fairchild as a contracts administrator and Pamela Lewis was employed as a junior designer. Both were the only black women in their respective positions.

Miller was first employed by Fairchild in 1974 as a clerk typist. In 1980, she was promoted to the non-clerical position of contracts administrator. Miller maintained a good relationship with her supervisor, Stan Peterson, until December 1981 when the work space for the Contracts Department was redesigned and Miller expressed dissatisfaction with the location of her new office. Shortly thereafter, Miller received a good overall performance evaluation, but was denied a merit increase due to her record of absenteeism. After complaining to

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[1]This matter is before this court for the second time. We previously reversed the district court's grant of summary judgment on all causes of action and remanded for trial. *See Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir.1986).

Supervisor Peterson and other Fairchild management personnel and receiving an unsatisfactory response, Miller filed an EEOC charge alleging race and sex discrimination.

Fairchild denied the discrimination charge, and the EEOC held a fact-finding conference on September 1, 1982. At that conference, Fairchild entered into a settlement agreement with Miller whereby Miller gave up her right to sue for discrimination under Title VII, and Fairchild promised to review the denial of Miller's merit increase and to provide Miller with training opportunities on an equal basis with similarly situated employees.[2]

Pamela Lewis began working in Fairchild's Engineering Department in 1979 as a draftsperson, and in 1981, she was promoted to junior designer. Lewis's supervisor, Glenn Ray, repeatedly denied her requests to take training courses, including classes to train on Fairchild's newly purchased computer-aided design and computer-aided manufacturing system (Cad/Cam). Lewis filed an EEOC charge of race and sex discrimination alleging that Ray denied her training opportunities provided to male Caucasian designers.

Fairchild denied the discrimination charge and the EEOC held a fact-finding conference on September 24, 1982. Fairchild entered into an agreement with Lewis in which it promised to transfer Lewis to a different supervisor within the Engineering Department, to allow Lewis to begin Cad/Cam training and to attend subsequent courses, and to remove any negative materials from

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[2]Additionally, Fairchild promised to reaffirm its commitment to equal employment opportunity for all persons. Miller promised to check monthly with her supervisor to assure her absences were within acceptable limits.

Lewis's personnel file. Lewis, for her part, waived her right to file a Title VII lawsuit for discrimination.

On November 5, 1982, less than two months after Miller and Lewis signed their settlement agreements with Fairchild, the company laid them off, citing economic reasons. Although other Fairchild employees were laid off at the same time, Miller was the only contracts administrator and Lewis was the only designer discharged.

On May 27, 1983, Miller and Lewis brought this action alleging that Fairchild discharged them in retaliation for filing EEOC complaints, in violation of (1) Title VII of the 1964 Civil Rights Act, (2) 42 U.S.C. § 1981 (Section 1981), and (3) the California Fair Employment and Housing Act (CFEHA). Miller and Lewis also allege that Fairchild breached the EEOC settlement agreements and the implied covenant of good faith and fair dealing, committed fraud, and intentionally or negligently inflicted serious emotional distress.

On November 26, 1984, the district court granted Fairchild's motion for summary judgment on all causes of action. This court reversed and remanded for trial after concluding that Miller and Lewis had presented triable factual issues on all claims. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir.1986).

In pretrial proceedings, the district court granted Fairchild's motion to bifurcate the trial on issues of liability and damages, dismissed the emotional distress claims as preempted by the California Workers Compensation Act, and ruled on Fairchild's eight motions in limine. Miller and Lewis appeal from the district court's pretrial rulings excluding parol evidence, determining the allocation of proof on the retaliation claims, dismissing punitive damages as to their negligence and breach of

contract claims, excluding the testimony of four lay witnesses, excluding the testimony of one expert witness, excluding statements regarding "statistical significance," and excluding evidence of hirings after their layoffs.

A three day jury trial commenced on May 5, 1987. The Title VII claim was tried to the court, and the remaining claims were tried to the jury. Miller and Lewis appeal four of the district court's evidentiary rulings during trial.

After both sides rested, the district court granted Fairchild's motion to dismiss appellants' Title VII retaliation claim under Fed.R.Civ.P. 41(b), and directed a verdict for Fairchild on the remaining claims under Fed.R.Civ.P. 50(a). The district court found that no reasonable jury could find in favor of Miller and Lewis based on the evidence presented.

DISCUSSION

1.

STANDARD OF REVIEW

We review the district court's involuntary dismissal of appellant's Title VII claim under the same standard applied to a judgment following a bench trial. *See Stone v. Millstein,* 804 F.2d 1434, 1437 (9th Cir.1986). The district court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. *Id.* We review for clear error the district court's factual finding that Lewis and Miller were not subject to discriminatory retaliation in violation of Title VII. *Unt v. Aerospace Corp.,* 765 F.2d 1440, 1444 (9th Cir.1985).

We review de novo the propriety of the directed verdict on the remaining claims. *See Donoghue v. Orange County,* 848 F.2d 926, 932 (9th Cir.1988). We view the evidence in

the light most favorable to the appellants, drawing all possible inferences in their favor, to determine if there is substantial evidence supporting a verdict for Miller and Lewis. *See Donoghue,* 848 F.2d at 932; *Lucas v. Bechtel Corp.,* 800 F.2d 839, 850 (9th Cir.1986). A directed verdict is proper when the evidence permits only one reasonable conclusion. *Donoghue,* 848 F.2d at 932.

We review the district court's pretrial dismissal of the emotional distress and the punitive damages claims de novo. *Fort Vancouver Plywood Co. v. United States,* 747 F.2d 547, 552 (9th Cir.1984). The district court's ruling with respect to parol evidence was based on the application of principles of contract interpretation and is reviewed de novo. *Miller v. Safeco Title Insurance Co., Inc.,* 758 F.2d 364, 367 (9th Cir.1985). We review the district court's evidentiary rulings and its decision to bifurcate the trial for an abuse of discretion. *Hirst v. Gertzen,* 676 F.2d 1252, 1261 (9th Cir.1982) (decision to bifurcate); *Kisor v. Johns-Manville Corp.,* 783 F.2d 1337, 1340 (9th Cir.1986) (evidentiary rulings).

II.
RETALIATORY DISCHARGE CLAIMS

Lewis and Miller allege that they were laid off by Fairchild in retaliation for filing charges with the EEOC in violation of Title VII, Section 1981 and the CFEHA.

Under Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), an employer may not retaliate against an employee for opposing discriminatory employment practices. *See Miller,* 797 F.2d at 730; *EEOC v. Crown Zellerbach Corp.,* 720 F.2d 1008, 1011 (9th Cir. 1983). Section 1981 provides an independent but overlapping federal remedy for intentional racial discrimination in employment. *Johnson v. Railway Express Agency, Inc.,*

421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975); *Lowe v. City of Monrovia,* 775 F.2d 998, 1010 (9th Cir.1985), *amended by* 784 F.2d 1407 (9th Cir.1986). Because facts sufficient to give rise to a Title VII claim may also support a Section 1981 claim, an employee may seek relief for a retaliatory discharge under both provisions. *See Miller,* 797 F.2d at 733.[3] Finally, Cal.Gov't Code § 12940(f) (West Supp.1988) prohibits an employer from discharging an employee for engaging in protected activities under the CFEHA. *See Miller,* 797 F.2d at 733.

After the presentation of all evidence, the district court dismissed the Title VII claim and directed a defense verdict on the Section 1981 and CFEHA claims after finding that (1) Fairchild had presented "a strong and compelling case" that the discharges were "business necessit[ies]" and (2) Miller and Lewis had failed to present any evidence to show Fairchild's legitimate explanation was merely a pretext for retaliation. After a full trial on a retaliatory discharge claim, the trier of fact must decide whether the plaintiff has met her burden of showing that "the employment decision more likely than not was motivated by a discriminatory reason. . . . [T]his burden is . . . carried if the plaintiff shows 'that the employer's proffered explanation is unworthy of credence.' " *U.S. Postal Service Bd. of Governors v. Aikens,*

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[3]*See also Greenwood v. Ross,* 778 F.2d 448, 455 (8th Cir.1985) (Section 1981 establishes a substantive right to be free from retaliatory discharge); *Goff v. Continental Oil Co.,* 678 F.2d 593 (5th Cir.1982) (Section 1981 encompasses retaliation claim based on an employer taking adverse action against an employee who filed an EEOC racial discrimination charge).

460 US. 711, 718-19, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1982) (Blackmun, J., concurring).[4]

Fairchild presented substantial evidence supporting its explanation that Miller and Lewis, the least skilled employees in their respective departments, were laid off because Fairchild had a shrinking need for labor caused by an ongoing economic decline. Fairchild's former Finance Director, Jack Brucker, testified that from 1981 to 1983, the company experienced declining sales and periodic layoffs due primarily to the diminished needs of the

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[4]The three stage order and allocation of proof for Title VII disparate treatment suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), governs actions for retaliatory discharge brought under Title VII, Section 1981, and the CFEHA. *See Sorosky v. Burroughs Corp.*, 826 F.2d 794, 803 (9th Cir.1987) (CFEHA age discrimination claim); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987) (Title VII retaliation claim); *Lowe*, 775 F.2d at 1010 (Section 1981 claim).

First, the plaintiff must establish a prima facie case of retaliation. *Yartzoff*, 809 F.2d at 1375; *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir.1984). The burden of production then shifts to the defendant-employer to articulate a legitimate, non-retaliatory explanation for the adverse employment action. *Yartzoff*, 809 F.2d at 1376; *Wrighten*, 726 F.2d at 1354. If the employer successfully rebuts the inference of retaliation, the burden of production shifts back to the plaintiff to show that the defendant's proffered explanation is merely a pretext for impermissible retaliation. *Yartzoff*, 809 F.2d at 1377; *Miller*, 797 F.2d at 731.

Since we are reviewing a retaliatory discharge claim after a full trial, however, the only relevant issue is whether the appellants met their burden of proving that a retaliatory reason more likely than not motivated Fairchild. *See Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.")

Space Shuttle program.[5] In October 1982, after Congress failed to appropriate funds to build the fifth Space Shuttle, Fairchild management determined that additional layoffs were necessary because existing and anticipated contract budgets could not support the current staff. Brucker determined the number of employees to be cut from each department and, in compliance with Fairchild's stated procedure, department heads assessed the comparative skills of their members to determine which individuals should be laid off.[6] Lewis and Miller were selected for layoff because their supervisors allegedly determined they were the least skilled employees in their respective positions.

[1] Although we recognize that Fairchild presented substantial evidence in support of its explanation for the discharges, we conclude that the district court erred in finding that Miller and Lewis presented "absolutely no evidence of pretext." Moreover, the court erred in directing a defense verdict on the Section 1981 and CFEHA claims based upon finding that no reasonable juror could find retaliation. When the evidence is viewed in the light most favorable to Miller and Lewis, they presented substantial evidence[7] that Fairchild's economic

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[5]From 1981 to 1983, 142 employees were laid off; 62 in 1981, 56 in 1982, and 22 in 1983.

[6]Fairchild's stated procedure for layoff selection is as follows:

> When it is determined that economic circumstances warrant a layoff, the company's staffing needs are determined with regard to matters such as numbers of employees needed, positions to be filled and skills required for those positions. Functional assignments are then made. Those employees to whom the company does not assign a position are laid off.

[7]Substantial evidence necessary to defeat a directed verdict is defined as "more than a scintilla of evidence." *Lucas*, 800 F.2d at 850

rationale was mere pretext and that Miller and Lewis were more likely laid off in retaliation for filing EEOC complaints. *See Donoghue,* 848 F.2d at 932 (standard for appellate review of directed verdict).

[2] First, to determine whether Fairchild's economic rationale was a pretext for retaliation, a jury could consider the timing of appellants' layoffs.[8] Miller was laid off only 59 days after she attended the EEOC fact-finding conference and signed the agreement with Fairchild; Lewis was laid off just 42 days after she signed her agreement. When Lewis was discharged, she had worked under her new supervisor for less than two weeks. A reasonable jury could infer that Lewis and Miller's filing of EEOC charges triggered their subsequent discharge.

[3] Second, a jury could infer retaliatory motivation from the evidence that the Fairchild management personnel who participated in the decisions to lay off Lewis and Miller were aware that the appellants had filed EEOC charges, had attended the EEOC fact-finding conference, and were the very people whose actions had prompted the appellants' complaint. Engineering Director Burns decided to lay off Lewis after he consulted with Supervisors Ray and Jones. Burns testified that he was aware of Lewis's discrimination charges, although he had not attended the EEOC fact-finding conference. Supervisor

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(quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)).

[8]The district court concluded that the timing of the layoffs established the causation element of appellants' prima facie case. To show pretext, a plaintiff may rely on evidence offered to establish the prima facie case, as well as on other evidence and effective cross-examination of defense witnesses. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 1095 n. 10, 67 L.Ed.2d 207 (1981); *Miller,* 797 F.2d at 732.

Ray's refusal to allow Lewis to attend training courses had induced Lewis to file her EEOC complaint. Ray attended the fact-finding conference where it was agreed that Lewis would be transferred to a new supervisor (Jones) and allowed to attend training courses. Moreover, Lewis testified to a history of communication problems with Supervisor Ray.

Burns testified that after consulting Ray, he selected Lewis because she was the least skilled and experienced member of the design group, and that Lewis's EEOC charges had no bearing on his decision. Lewis conceded that she was the least skilled designer, but she also testified that she had begun doing more advanced work under her new supervisor. Based on this evidence, a jury could question the credibility of Burns's testimony that Lewis's layoff was solely motivated by a neutral assessment of her skills. To establish retaliation, Lewis is required to show only that the filing of the EEOC complaint was *one of the reasons* for her discharge, and that but for filing the complaint, she would not have been laid off. *See Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir.1984).

Contracts Director Cassidy and Supervisor Peterson selected Miller as the one contracts administrator to be discharged. Both has attended the EEOC fact-finding conference where Miller's conflicts with Peterson (regarding work space and a deferred pay increase) were discussed. Miller testified that before filing her EEOC complaint, she had repeatedly complained to both Cassidy and Peterson.

At trial, Peterson testified that the layoff of one contracts administrator was necessary because there was a decline in the workload, and that Miller was selected because she was the least experienced employee and the

only one unable to administer government contracts.[9] Although Miller admitted she was the least skilled contracts administrator, she also testified that she, as well as the other contracts administrators, had a very heavy workload at the time she was discharged. Based on this evidence, a jury could question whether the layoff of a contracts administrator was economically mandated and conclude that the selection of Lewis was motivated, at least in part, by retaliation.[10]

[4] Third, there was evidence that at the same time Miller and Lewis were discharged, four senior employees were transferred to delay or prevent the layoff of less skilled employees. A jury could infer that this procedure was not followed to protect Miller and Lewis because they had filed EEOC complaints. Indeed, Miller testified that when Supervisor Peterson informed her she was being laid off, she reminded him that she had clerical skills and would be willing to be transferred to another position to avoid layoff.

[5] Finally, Miller testified that after she learned of the layoff, George Morando, a manager in Fairchild's Engineering Department, told her she should not be surprised that she was discharged after signing the EEOC settlement agreement. Fairchild attempted to discredit this testimony by establishing that Morando re-

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[9]Peterson testified, however, that if another contracts administrator had left voluntarily, he could have kept Miller on and trained her to administer government contracts.

[10]At least one Fairchild director was initially suspicious of Peterson's choice. Finance Director Brucker testified that when Peterson and Cassidy informed him that they had selected Miller for layoff, he told them it was a controversial decision and questioned them carefully to assure that the decision was based on her comparative lack of skills.

signed from Fairchild two months before he allegedly spoke to Miller because he was dissatisfied with his failure to advance in the company. Although this information could affect the jurors' evaluation of Morando's comment, they might still consider it as a former manager's representation of the attitudes of Fairchild's management.

Appellants' circumstantial evidence that Fairchild's economic rationale is mere pretext is not stong. Nevertheless, based on the evidence presented, a jury could reasonably find that it was not economically necessary to lay off these particular employees, and that Miller and Lewis were specifically selected in retaliation for filing EEOC charges. Although, after weighing the evidence and evaluating witness credibility, the jury might find that Miller and Lewis failed to prove retaliation, the district court erred in directing a defense verdict and precluding the jury from making this determination. *Cf. Yartzoff v. Thomas,* 809 F.2d 1371, 1377-78 (9th Cir.1987) (summary judgment on retaliation claims inappropriate even though plaintiff-employee may not ultimately prevail at trial).

As a summary procedure, a directed verdict should be used judiciously, particularly in cases involving issues of motivation or intent. *Douglas v. Anderson,* 656 F.2d 528, 535 (9th Cir.1981). An employee's claim of retaliatory discharge requires a determination of an employer's true motivation, an elusive factual question which is difficult to ascertain and generally unsuitable for summary disposition. *See Miller,* 797 F.2d at 732-33; *Lowe,* 775 F.2d at 1008, 784 F.2d at 1407. A directed verdict is improper when there is conflicting testimony raising a question of witness credibility. *See Donoghue,* 848 F.2d at 932. Here, determining Fairchild's true reasons for discharging the

appellants requires an evaluation of the credibility of the company managers who testified that they selected Miller and Lewis solely because of their lack of skills.

[6] We conclude that the district court erred in directing a defense verdict on the Section 1981 and the CFEHA claims; we reverse and remand for a new trial on those causes of action. However, as the trier of fact on the Title VII claim, the court was entitled to weigh the evidence and evaluate witness credibility. *See* Fed.R.Civ.P. 52(a); *United States v. Smith,* 625 F.2d 278, 279-80 (9th Cir.1980). Fairchild presented significant evidence that its declining economic condition necessitated the appellants' layoffs, which the court was entitled to weigh against Lewis and Miller's evidence of pretext. Therefore, we affirm the district court's dismissal of the appellants' Title VII claim based on its finding that Fairchild's economic rationale was not a pretext for unlawful retaliation. *See Unt,* 765 F.2d at 1444.

III.
BREACH OF CONTRACT

Miller and Lewis allege that by discharging them within two months after they negotiated the EEOC settlement agreements, Fairchild breached an implied term of the agreements that guaranteed Miller and Lewis continued employment for a reasonable period that would allow them to enjoy the benefits of Fairchild's promises.[11]

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[11]Neither agreement expressly guaranteed Miller or Lewis continuing employment for any time period. Each agreement included a clause stating that the agreement constituted "the complete understanding" between the parties and the EEOC, and that "[n]o other promises or agreements shall be binding unless signed by these parties."

Under California law,[12] a contract must be interpreted to effectuate the mutual intention of the parties at the time of contracting, so far as that intention is ascertainable and lawful. Cal.Civil Code § 1636 (West 1985); *Jacobs v. Freeman,* 104 Cal.App.3d 177, 188, 163 Cal.Rptr. 680, 686 (1980). The existence of an implied contract or contractual term thus turns on the intent of the parties. " '[I]t must be deetermined, as a question of fact, whether the parties acted in such a manner as to provide the necessary foundation for [an implied contract], and evidence may be introduced to rebut the inference and show that there is another explanation for the conduct.' " *Foley v. Interactive Data Corp.,* 47 Cal.3d 654, 254 Cal.Rptr. 211, 223, 765 P.2d 373, 385, (1988) (quoting *Silva v. Providence Hosp. of Oakland,* 14 Cal.2d 762, 764, 97 P.2d 798 (1939)).

[7] To ascertain the parties' intent, the district court properly admitted extrinsic evidence regarding the circumstances surrounding the agreements' formation. *See* Cal.Civil Code § 1647 (West 1985); *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975); *Miller,* 797 F.2d at 734-35; *Western Camps, Inc. v. Riverway Ranch Enterprises,* 70 Cal.App.3d 714, 722-23, 138 Cal.Rptr. 918, 923 (1977). However, the district court erroneously concluded that jurors could not reasonably infer from this evidence that the parties intended Fairchild to provide continued employment for a reasonable period.[13]

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[12]In construing the settlement agreements at issue in this case, we apply principles of California contract law. *See Miller,* 797 F.2d at 733; *Ferguson v. Flying Tiger Line, Inc.,* 688 F.2d 1320, 1322 (9th Cir.1982).

[13]The district court's findings regarding the parties' intent, based on extrinsic evidence, are reviewable as findings of fact. *See Miller,*

[8] Both women testified that a purpose of the settlement agreements was to enable them to improve their performance at Fairchild. Lewis and Miller relinquished valuable rights to file Title VII discrimination lawsuits against Fairchild in exchange for Fairchild's promise to provide them training which they needed in order to improve their skills and to advance in the company. A reasonable jury could find that Fairchild could not have meaningfully discharged this obligation unless Lewis and Miller remained employed for a reasonable period.[14] *See Marin County v. Assessment Appeals Bd.*, 64 Cal.App.3d 319, 328, 134 Cal.Rptr. 349, 355 (1976) (rejecting interpretation of contract whereby one party remains bound by contractual restrictions but is simultaneously deprived of the benefits of the bargain).

Both Lewis and Miller admitted that at the time of the EEOC conferences, they were aware of ongoing layoffs at Fairchild and were not explicitly promised layoff protection. However, both women testified that they did not ask

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758 F.2d at 367. We review the grant of a directed verdict to determine whether the jurors could have reasonably found in the appellants' favor. *See Donoghue*, 848 F.2d at 932.

[14]Although we need not define the outer limits of such a reasonable period, we conclude that a reasonable jury could find that it is longer than two months.

Because Lewis and Miller were laid off within two months of signing their agreements, a jury could find they did not fully receive the promised benefits. Lewis actually worked under her new supervisor for less than two weeks. She began the Cad/Cam training course before she was discharged and was able to continue for four months after her layoff. However, she was informed that she was ineligible to complete the 32 week course because she was no longer employed by Fairchild, and she was precluded from attending subsequent courses. Miller received her deferred merit increase for only one month before her discharge and never attended training courses.

for such protection at their conferences because they did not feel personally threatened by potential discharge.[15] Moreover, both women testified they believed the settlement agreements implicitly guaranteed them layoff protection.

A jury should evaluate the credibility of the appellants' assertions. *See Donoghue,* 848 F.2d at 932 (directed verdict improper when conflicting testimony raises a question of witness credibility). Based on the extrinsic evidence, viewed in the light most favorable to the appellants, a jury could reasonably find that the parties intended an implied covenant of continued employment. Thus, the district court erred in directing a verdict on the breach of contract claim. *See id.*

IV.

TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Lewis and Miller allege that their retaliatory discharge within two months after negotiating the EEOC settlement agreements constituted a tortious breach of the implied covenant of good faith and fair dealing.

[9] We affirm the district court's directed verdict on the appellants' claim for tortious breach of the implied covenant of good faith and fair dealing. Under California law, "tort remedies are not available for breach of the implied covenant [of good faith and fair dealing] in an

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[15]Lewis testified that just prior to the EEOC conference, Fairchild's Director of Administration and Security, Bob Friend, assured her that she would not be laid off. Friend disputed this and testified that he had no authority to make such a promise. Miller testified that she felt secure at Fairchild because of her heavy workload, transferable skills and support within the company.

employment contract to employees who allege that they have been discharged in violation of the covenant." *Foley v. Interactive Data Corps,* 47 Cal.3d 654, 254 Cal.Rptr. 211, 239, 765 P.2d 373, 401 (1988). Although *Foley* was decided while this case was pending appeal, we follow *Foley* because "[a]bsent manifest injustice . . . we generally apply the law as it exists when we render our decision." *Rubin v. Belo Broadcasting Corp.,* 769 F.2d 611, 614 (9th Cir.1985).

V.
FRAUD

Lewis and Miller allege that Fairchild fraudulently induced them to enter into the settlement agreements by concealing the fact that they were probable candidates for a future layoff and by making promises which Fairchild had no intention of performing.

To establish actual fraud under California law, the plaintiff must show that the defendant, with intent to deceive or induce the plaintiff to enter into a contract, (1) misrepresented a material fact, (2) suppressed facts it knew or believed to be true, or (3) made a promise intending not to perform it. *See* Cal.Civil Code § 1572 (West 1982); *Miller,* 797 F.2d at 738 (applying California law). *Scofield v. State Bar,* 62 Cal.2d 624, 628, 401 P.2d 217, 219, 43 Cal.Rptr. 825, 827 (1965); *Jacobs,* 104 Cal.App.3d at 192, 163 Cal.Rptr. 680.

[10] Miller and Lewis presented evidence that when the parties negotiated the settlement agreements, Fairchild concealed the fact that Miller and Lewis would likely be laid off in the near future. The managers who represented Fairchild at the EEOC settlement conferences testified that when they attended the conferences in September 1982, they were aware of the company's ongo-

ing economic decline and potential imminent layoffs, but did not specifically know that Miller and Lewis would be laid off in November. Ralph Bache, who attended both conferences as Fairchild's Personnel Director, admitted he know there could be layoffs later that year when he signed both agreements on Fairchild's behalf, but did not inform Miller or Lewis of the potential layoffs.[16]

The Fairchild representatives also knew that Fairchild selected employees for layoff based on a comparative skills assessment and that Miller and Lewis were the least skilled individuals in their respective positions. A jury could reasonably infer, based on this information, that the managers knew or believed that Miller and Lewis were likely layoff candidates, and intentionally concealed this information at the settlement conferences.

The subsequent failure to perform a promise warrants an inference that the promisor did not intend to perform. *See Rambo v. Blain,* 263 Cal.App.2d 158, 163, 69 Cal.Rptr. 132, 135 (1968); *Boyd v. Bevilacqua,* 247 Cal.App.2d 272, 292, 55 Cal.Rptr. 610, 623-24 (1966). Here, Fairchild did not provide Miller and Lewis with promised training opportunities because it discharged them within two months after negotiating the agreements. This subsequent conduct could support a finding that Fairchild did not intend to perform its promises when it signed the agreements. *See Boyd,* 247 Cal.App.2d at 292, 55 Cal.Rptr. 610.

Actual fraud is a question of fact involving determinations of intent and evaluations of credibility properly resolved by the jury. *See* Cal.Civil Code § 1574; *Jacobs,*

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[16]Bache testified that at the end of Lewis's conference, he and Supervisor Ray told the EEOC representative that they might be back at the EEOC because of potential layoffs. Lewis was not present during this conversation.

104 Cal.App.3d at 192, 163 Cal.Rptr. 680. Here, because jurors could have reasonably inferred that Fairchild fraudulently induced Miller and Lewis to enter into the settlement agreements, the district court erred in directing a verdict on appellants' fraud claim. *See Donoghue,* 848 F.2d at 932.

VI.
EMOTIONAL DISTRESS

[11] The district court dismissed the appellants' claims for intentional and negligent infliction of emotional distress, reasoning that they are precluded by California Workers' Compensation Act, Labor Code § 3600 et seq. (WCA). The latest California Supreme Court case on this issue is *Cole v. Fair Oaks Fire Protection Dist.,* 43 Cal.3d 148, 233 Cal.Rptr. 308, 729 P.2d 743 (1987). In *Cole,* the court held that the WCA precludes civil suits only "when the essence of the wrong is personal physical injury or death." 233 Cal.Rptr. at 315, 729 P.2d at 750. The court reasoned that, since only physical injuries are compensable under the WCA, "unless an action were permitted in cases where there was no physical injury or disability, the employee would be left without any remedy whatsoever. . . ." 233 Cal.Rptr. at 312, 729 P.2d at 747 (citation omitted). Since the appellants do not claim that any physical injuries or disabilities resulted from Fairchild's alleged misconduct, *Cole* establishes that their emotional distress claims are not precluded by the WCA.

Fairchild relies on the California Court of Appeals decision in *Hart v. National Mortgage & Land Co.,* 189 Cal.App.3d 1420, 235 Cal.Rptr. 68 (1987). In *Hart,* the court announced that "the time should and has come to cast aside the . . . 'physical versus emotional harm' ap-

proach in favor of another factor more logically connected to the workers compensation or suit-at-law choice. That factor is whether the acts complained of were a 'normal part of the employment relationship', or, whether the acts were incidents of the employment relationship." 235 Cal.Rptr. at 73 (citations omitted). Whatever the merit of this position, it is clear that the Court of Appeals in *Hart* lacked the authority to modify the test enunciated by the California Supreme Court in *Cole*.[17] In any event, the alleged misconduct in this case is certainly not a "normal part of the employment relationship." Miller and Lewis contend that they suffered emotional distress as a result of being laid off following settlement negotiations concerning their complaints of racial discrimination. In our view, this is not a "normal" pattern of events in the workplace, and no California court has characterized it as such. On the contrary, the court in *Hart* indicated that the California courts do not broadly construe the term a "normal part of the employment relationship." *See Hart*, 235 Cal.Rptr. at 74 ("there can be little doubt" that sexual harassment by a manager toward a lower level employee is not "a normal part of employment").

VII.
PUNITIVE DAMAGES

[12] Miller and Lewis contend that the district court erred in dismissing their claim for punitive damages for breach of contract and for the negligent infliction of

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[17]In *Cole*, the court held that whether the acts complained of were "a normal part of the employment relationship" is relevant in determining the availability of a civil suit only where the employee suffered *both* physical injury and emotional distress. *Cole*, 233 Cal.Rptr. at 315, 729 P.2d at 749.

emotional distress.[18] The district court's ruling was correct with respect to the breach of contract claim. California law does not permit punitive damages for breach of contract. Section 3294(a) of the California Civil Code expressly provides that punitive damages are recoverable only for actions "not arising from contract." *See also Sawyer v. Bank of America,* 83 Cal.App.3d 135, 145 Cal.Rptr. 623, 626 (1978) ("the only supportable theory of liability was for breach of contract. . . . Hence, the award of punitive damages cannot be sustained").

[13] The district court erred in dismissing the appellants' punitive damages claim for the negligent infliction of emotional distress. In our previous opinion in this case, we noted that Miller's and Lewis's negligent infliction of emotional distress claim "[p]resumably . . . does not refer to Fairchild's asserted retaliatory discharge [but rather to] Fairchild's act of negotiating settlement agreements and then laying off [Miller and Lewis] prior to their enjoyment of benefits implied under the contract." *Miller,* 797 F.2d at 738. Miller's and Lewis's negligent infliction of emotional distress count clearly could be read as alleging that Fairchild consciously disregarded their contract rights when it laid them off. This count alleged (by incorporation) that Fairchild's acts were "willful, wanton, malicious and oppressive." Under California law, a defendant's "conscious disregard" of a plaintiff's rights justifies the award of punitive damages. *See* California Civil Code §§ 3294(a) and 3294(c) (punitive damages may be awarded where the defendant acted with "malice"; malicious conduct includes "conduct which is carried on by the defendant with conscious disregard of the rights or

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[18]Miller and Lewis also seek punitive damages in their Section 1981, California Fair Employment and Housing Act and fraud counts.

safety of others"). *See also Petersen v. Superior Court,* 31 Cal.3d 147, 181 Cal.Rptr. 784, 791, 642 P.2d 1305, 1312 (1982) ("the law in California ha[s] evolved in the area of punitive damages to the point where a finding of defendant's conscious disregard of the safety or rights of others w[ill] support an award of punitive damages"); *Silberg v. California Life Insurance Co.,* 11 Cal.3d 452, 113 Cal.Rptr. 711, 718, 521 P.2d 1103, 1110, (1974) ("to justify an award of exemplary damages, the defendant must . . . act . . . with conscious disregard of the plaintiff's rights"); *Roth v. Shell Oil Co.,* 185 Cal.App.2d 676, 8 Cal.Rptr. 514, 517-18 (1960) (in determining whether to uphold a punitive damage award, "[t]he only question is whether or not a jury might rightfully [have] dr[awn] an inference from the evidence produced that there was a conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship").

VIII.
BIFURCATION, PAROL EVIDENCE, AND EVIDENTIARY RULINGS

A. Bifurcation

[14] Miller and Lewis argue that the district court erred in bifurcating the trial of Fairchild's liability and damages. We suggest that the district court on remand reconsider its view that the possible savings in time justifies bifurcation in this case. The district court decided to bifurcate the trial after it had erroneously ruled that the emotional distess claims were precluded. On remand, Miller and Lewis's emotional distress claims presumably will be tried on their merits. In an intentional infliction of emotional distess claim, the issue of liability is intertwined with the issue of damages since the trier of

fact can find liability only if it first finds that the plaintiff suffered severe emotional distress. *See Wallis v. Superior Court,* 160 Cal.App.3d 1109, 297 Cal.Rptr. 123, 130 (1984) (outlining requirements for an intentional infliction of emotional distress action). Similarly, a finding of liability for negligent infliction of emotional distress is predicated on a finding of "serious emotional distress." *Molien v. Kaiser Foundation Hospitals,* 27 Cal.3d 916, 167 Cal.Rptr. 831, 839, 616 P.2d 813, 821, (1980) (en banc). An attempt to separate the trial of the liability and damages issues in this case would therefore tend to create "confusion and uncertainty," *Compare United Air Lines, Inc. v. Wiener,* 286 F.2d 302, 304 (9th Cir.1961) (bifurcation is improper where "[t]he question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty").

B. Parol Evidence

[15] Miller and Lewis argue that the district court erred in granting Fairchild's motion to exclude parol evidence. The district court recognized that "evidence of the surrounding circumstances [is] admissible to interpret the contract." The court ruled that "what is inadmissible will be any statement that there is some side agreement or some side understanding other than that mentioned in the contract." This ruling is consistent with established principles of California contract law. Both the agreement between Miller and Fairchild and the agreement between Lewis and Fairchild stated that "[t]his agreement constitutes the complete understanding [between the parties to the agreement]. No other promises or agreements shall be binding unless signed by these parties." Miller and Lewis do not argue that they misunderstood or were unaware of this language. Under these

circumstances, it is reasonable to conclude that in both Miller's and Lewis's cases "the parties to [the] written agreement have agreed to it as an 'integration' — a complete and final embodiment of the terms of [the] agreement — [and] parol evidence [therefore] cannot be used to add to or vary its terms." *Marani v. Jackson,* 183 Cal.App.3d 695, 702, 228 Cal.Rptr. 518, 521 (1986) (citations omitted).

C. Exclusion of Lay Witnesses' Testimony

[16] The district court ruled that the testimony of four of Miller's and Lewis's relatives were irrelevant during the liability phase of the trial because it concerned only the emotional distress Miller and Lewis allegedly suffered as a result of Fairchild's actions. Since proof of the existence of distress is critical to the determination of Fairchild's liability for negligent and intentional infliction of emotional distess, the district court on remand should not exclude this evidence at the liability phase, whether or not it again chooses to bifurcate the trial of the liability and damages issues.

D. Exclusion of Expert Testimony

[17] Miller and Lewis contend that the district court erred in excluding the expert testimony of James W. Potts. Miller and Lewis apparently did not satisfy Local Rule 9.4.6's requirement of an exchange of a short narrative statement of the testimony expected to be elicited at trial, providing the defendant and the court only with the conclusory statements that the testimony would concern "[r]ecommended personnel policies and procedures for California employers faced with reduction of staff" and would conclude that "[d]efendant's termination of plaintiffs was improper and unreasonable under the circumstances." Miller and Lewis provided no explanation of

their failure to comply with Local Rule 9.4.6, and did not offer to comply when the district court heard the motion. Under these circumstances, the district court did not abuse its discretion in excluding the testimony in response to the appellants' noncompliance. *See Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1382-83 (9th Cir.1984) ("the district court may, in its discretion, exclude expert witnesses not disclosed in pretrial as required by local rules"); *Wirtz v. Hooper Homes Bureau, Inc.*, 327 F.2d 939, (5th Cir.1964) (same). *See also Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir.1986) ("The trial court properly exercised its discretion in excluding [an] expert['s] testimony . . . because [the defendant] gave the plaintiffs no advance notice of the fact and substance of his expert testimony and therefore no opportunity to prepare to meet it").

The district court also excluded Potts's testimony because it concluded that this evidence would not be useful to the jury in deciding whether Fairchild terminated the appellants in retaliation for their complaints about racial discrimination.

[18] Since the district court earlier had dismissed the negligent infliction of emotional distress claims, it did not consider whether testimony about California employers' procedures regarding layoffs might be relevant in deciding whether Fairchild was negligent in laying Miller and Lewis off despite its alleged implied contractual obligations to them. In a negligent infliction of emotional distress case, industry custom or practice is relevant in determining the defendant's duty of care. *See Bullis v. Security Pacific National Bank*, 21 Cal.3d 801, 148 Cal.Rptr. 22, 25, 582 P.2d 109, 112 (1978) (under California law, "the custom in the community . . . is evidence to be considered in determining the proper standard of

care"); 6 Witkin, *Summary of California Law*, § 754, at 93 (9th ed. 1988).

E. Exclusion of Evidence of Hirings and Admission of Evidence of Layoffs

Miller and Lewis challenge the district court's exclusion of evidence of hirings made by Fairchild after they were laid off. They also challenge the district court's admission of Fairchild's evidence of layoffs both proceeding and following their layoffs.

[19] The district court found that the appellants' evidence of hirings following their layoffs was admissible only with respect to "persons that [were] hired to perform tasks that the [appellants] were qualified to perform." The district court expressed concern that the jury might conclude from other evidence of hirings that "Fairchild has a lot of money and they could hire these other people, they didn't have to let your people go." Nonetheless, the district court admitted Fairchild's evidence of layoffs in job categories *other than* those of the appellants which were made after the appellants' layoffs. The district court did not explain the relevance of such evidence,[19] but Fairchild concedes that it was presented to show "Fairchild's economic condition." If this evidence of "unrelated" layoffs was admissible in order to show that Fairchild's economic position was such that it was forced to reduce its workforce, we do not see why evidence of "unrelated" hirings should not be admissible to support the opposite suggestion about Fairchild's eco-

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[19]The district court explained that evidence of layoffs in unrelated job categories *before* the appellants' layoffs was relevant because "the longer layoffs were taking place . . . the more likely the [appellants] would have known about it, and that is one of the possible issues of the case."

nomic condition. Thus, we conclude that the district court abused its discretion in excluding the appellants' evidence of hirings. However, since evidence of unrelated hirings provides relatively weak support for the appellants' argument that Fiarchild's economic condition was a mere pretext for their layoffs, we conclude that this exclusion was not sufficiently prejudicial to warrant reversal of the Title VII dismissal. *See Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir.1985) (evidentiary errors will not be reversed "absent some resulting prejudice"); *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir.1980) (erroneous evidentiary ruling does not justify reversal if it did not have a "substantial" effect on any of the parties).

F. Exclusion of Comments on "Statistical Signficance"

[20] The district court ruled that Miller and Lewis could not argue the "statistical significance" of the fact that they were the only blacks in their respective departments, that they were the only employees with settlement agreements with the EEOC, and that they were laid off on the same day. The district court, however, ruled that Miller and Lewis could "bring [these facts] out and argue whatever [they] think the inferences are." Since the district court permitted Miller and Lewis to offer and argue this evidence, we do not find that they were in any way prejudiced by the mere exclusion of commentary as to "statistical significance."

G. Exclusion of Termination Clearance Form

[21] Miller and Lewis argue that the district court erred in admitting Exhibit 137 into evidence over their hearsay and foundation objections. Exhibit 137 is a termination clearance document. Fairchild apparently prepares a termination clearance document whenever an employee

turns in his security badge. The appellants contend that the district court relied on Exhibit 137 to discredit Miller's testimony that a manager told her that she should expect to be laid off because she signed the EEOC settlement agreement. Miller and Lewis concede that Exhibit 137 might fall under Fed.R.Evid. 803(6)'s business document exception to hearsay, but argue that this exception's "foundation" requirement was not met in this case. Fed.R.Evid. 803(6) requires that a qualified person testify that it is the practice of the business to make the record and that the record is kept in the course of regularly conducted business activity. Miller and Lewis argue that Jack Brucker is not "a qualified person" within the meaning of Rule 803(6). Brucker testified that he is Fairchild's Chief Financial Officer and exercises supervisory authority over the payroll department. He also testified that the termination clearance document at issue was prepared by the personnel department and signed by the Department of Finance, of which he was in charge. His testimony demonstrates that he is qualified within the meaning of Rule 803(6). The foundation requirement for Rule 803(6) "may be satisfied by the testimony of anyone who is familiar with the manner in which the document was prepared, even if he lacks firsthand knowledge of the matter reported, and even if he did not himself either prepare the record or even observe its preparation." 4 Louisell and Mueller, *Federal Evidence*, § 446, at 663-64 (1979) (footnotes omitted). Indeed, we have previously noted that " '[i]t is not [even] necessary that a sponsoring witness be employed by the business at the time of the making of each record . . . . [O]bjections, relating to the identity or competency of the actual preparer, may [be] relevant to the evidentiary weight or credibility of the documents, but [do] not [affect] their admissibility.' " *United States v. Smith*, 609 F.2d 1294, 1302 (9th Cir.1979)

(quoting *United States v. Evans*, 572 F.2d 455, 490 (5th Cir.1978)).

H. Sustaining the Objection to a Question to Brucker

[22] Mitchell and Lewis argue that the district court erred in sustaining Fairchild's objection to the following question posed to Jack Brucker, "Did you give [Miller's] concerns as much consideration as Fairchild's at the time you decided that it was okay to go ahead and weather the controversy and lay her off?" The court sustained the objection on relevance. While the nature and extent of Fairchild's attention to Miller's "concerns" might be relevant to issues in the suit, Miller and Lewis have not shown the district court abused its discretion under Rule 401 when it concluded that the precise question of whether Fairchild gave its own and Miller's concerns *equal* consideration is irrelevant. *See generally* Cleary, ed., *McCormick on Evidence*, at 546-47 (1984) (with respect to relevance, "[w]ise judges may come to differing conclusions in similar situations .... Accordingly, much leeway is given to trial judges").

I. Fairchild's Use of Leading Questions in its Examination of Jack Brucker

[23] Miller and Lewis contend that Fairchild improperly developed Jack Brucker's testimony through leading questions. After Brucker testified about relatively complex inventory practices, Fairchild's attorney in effect led Brucker through an extended hypothetical concerning these practices. During this portion of his testimony, Brucker did little more than repeatedly respond "right." The district court overruled Miller's and Lewis's objection at trial. It is not entirely clear that Fairchild's leading questions were necessary to develop Brucker's testimony. *See* Fed.R.Evid. 611(c) ("Leading questions

should not be used on direct examination of a witness except as may be necessary to develop his testimony"); 3 Louisell and Mueller, *Federal Evidence* § 339, at 462-63 (1979) (Rule 611(c)'s "necessity" exception applies where a witness is very young, timid, ignorant, unresponsive, or infirm). However, Rule 611(c) vests broad discretion in trial courts, and we will therefore reverse on the basis of improper leading questions only if "the judge's action . . . amounted to, or contributed to, the denial of a fair trial." Cleary, ed., *McCormick on Evidence,* at 12 (1984) (footnote omitted). *See also United States v. Tsui,* 646 F.2d 365, 369 (9th Cir.1981); *United States v. DeFiore,* 720 F.2d 757, 764 (2d Cir.1983) (" '[a]n almost total unwillingness to reverse for infractions [of the rule against leading questions] has been manifested by appellate courts' ") (quoting Advisory Committee Note to Rule 611). Reversal on this basis would be inappropriate here because the testimony elicited through leading questions did not substantially expand or alter earlier testimony elicited through proper, non-leading questions.

IX.
CONCLUSION

We affirm the dismissal of the Title VII claim and the directed verdict on the claim for tortious breach of the implied covenant of good faith and fair dealing. We reverse the dismissal of the emotional distress claims and the directed verdict on the breach of contract, fraud, Section 1981 and CFEHA claims. We remand for a new trial.

AFFIRMED in part, REVERSED in part, and REMANDED.

DIANE MILLER AND PAMELA LEWIS,
Plaintiff-Appellants,

v.

FAIRCHILD INDUSTRIES, INC., A
MARYLAND CORPORATION,
Defendant-Appellee.

No. 87-6325.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 1, 1988.
Withdrawn from Submission
Aug. 2, 1988.

Resubmitted May 23, 1989.

Decided May 23, 1989.

As Amended on Denial of Rehearing and
Rehearing En Banc Sept. 19, 1989.

Two black female employees brought action against employer alleging they were discharged from their employment in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission. The United States District Court for the Central District of California, James M. Ideman, J., entered summary judgment for employer, and employees appealed. The Court of Appeals, 797 F.2d 727, reversed and remanded. On remand, the District Court dismissed Title VII retaliation claim and directed verdict for employer on remaining claims. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) jury question existed as to whether employer's economic rationale was mere pretext for retaliatory discharge of employees who filed EEOC complaints; (2) jury questions existed as to whether employer breached settlement agreement's implied guarantee of

continued employment; and (3) jury question existed as to whether employer fraudulently induced employees to enter settlement agreements by concealing their probable future layoffs.

Affirmed in part, reversed in part, and remanded.

Opinion 876 F.2d 718 superseded.

1. Master and Servant — 43

Despite employer's presentation of substantial evidence in support of its explanation for discharges of employment discrimination plaintiffs, plaintiffs presented substantial evidence necesssary to defeat directed verdict that employer's rationale was mere pretext and that they were more likely laid off in retaliation for filing EEOC discrimination complaints. 42 U.S.C.A § 1981; West's Ann.Cal.Labor Code § 3201 et seq.

2. Master and Servant — 40(2)

Timing of employment discrimination plaintiffs' layoffs could be considered in determining whether employer's economic rationale was pretext for retaliation; one employee was laid off 59 days after she attended EEOC fact-finding conference and signed settlement with employer, while another was laid off 42 days after she signed her agreement. 42 U.S.C.A. § 1981.

3. Master and Servant — 40(1)

In employment discrimination action, evidence that employer's management personnel who participated in decisions to lay off employment discrimination plaintiffs were aware that they had filed EEOC charges, had attended EEOC fact-finding conference and were the very people whose actions had prompted plaintiffs' complaints,

supported inference of retaliation. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; West's Ann.Cal.Labor Code § 3201 et seq.

4. Master and Servant — 40(4)

In determining whether employer charged with employment discrimination had retaliated against plaintiffs for filing employment discrimination charges, evidence that four senior employees were transferred to delay or prevent the layoff of less skilled employees at the same time that the plaintiffs were discharged, although the same procedure was not followed to protect the plaintffs, could be considered as evidence of retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Master and Servant — 40(4)

Evidence that manager, who subsequently resigned, told employee that after she was laid off that employee should not be surprised if she was discharged after signing EEOC settlement agreement was evidence which could be considered in establishing prima facie case of discriminatory retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Jury — 37

In a case involving an employee's equitable discrimination claim, such as one under Title VII, and a legal discrimination claim, such as one under 42 U.S.C.A. § 1981, against an employer based on the same facts, the trial judge was required by the Seventh Amendment to follow the jury's implicit or explicit factual determinations in deciding the legal claim when the judge was resolving the equitable claim. 42 U.S.C.A. § 1981 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e

et seq.; West's Ann.Cal.Gov.Code § 12900 et seq.; U.S.C.A. Const.Amend. 7.

7. Evidence — 450(5)

District court properly admitted extrinsic evidence regarding circumstances surrounding formation of agreements to ascertain parties' intent in negotiating EEOC settlement agreement, which employees claimed contained implied guarantee of continued employment for reasonable period. West's Ann.Cal.Civ.Code § 1647.

8. Master and Servant — 43

Laid off employees' testimony that a purpose of settlement agreements with employer was to enable them to improve their work performance created jury question as to whether parties intended employer to provide continued employment for reasonable period; employees relinquished valuable rights to file Title VII discrimination lawsuits against employer in exchange for employer's promise to provide them training necessary to advance in company, both employees testified that they did not ask for layoff protection despite awareness of ongoing layoffs, because they did not feel personally threatened by potential discharge, and both testified they believed settlement agreements implicitly guaranteed them layoff protection. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Federal Courts — 925

Absent manifest injustice, Court of Appeals could apply rule of case decided while employment discrimination case was pending appeal to affirm directed verdict on claim for tortious breach of implied covenant of good faith and fair dealing.

10. Compromise and Settlement — 24

Jury question existed as to whether employer fraudulently induced employees to enter settlement agreements by concealing the fact that they were probable candidates for a future layoff and by making promises which the employer had no intention of performing; employees presented evidence that during settlement negotiations employer concealed fact that employees would likely be laid off in near future, there was evidence that employer selected employees for layoff based on comparative skills assessment and employees were least skilled individuals in their respective positions, and employer failed to provide employees with promised training opportunities when it discharged them within two months after negotiating settlement agreements. West's Ann.Cal.Civ.Code § 1572.

11. Workers' Compensation — 2084

Discharged employee's claims for intentional and negligent infliction of emotional distress based on emotional distress they suffered as a result of being laid off following settlement negotiations concerning their complaints of race discrimination were not precluded by California Worker's Compensation Act. West's Ann.Cal.Labor Code § 3600 et seq.

12. Master and Servant — 41(5)

Dismissed employees could not recover punitive damages for breach of contract. West's Ann.Cal.Civ.Code § 3294(a)

13. Master and Servant — 41(5)

Discharged employees' claims for negligent infliction of emotional distress, which could be read as alleging that

their former employer consciously disregarded their contract rights when it laid them off, alleged a "conscious disregard" of rights sufficient to support request for punitive damages under California law. West's Ann.Cal.Civ.Code § 3294(a, c).

14. Federal Civil Procedure — 1961

The issue of liability on intentional infliction of emotional distress claim was intertwined with damages issue and thus separate trials on liability and damages issues would tend to create "confusion and uncertainty."

15. Evidence — 442(1)

Absent any allegations that discharged employees misunderstood or were unaware of language that settlement agreement constituted complete understanding between the parties, parol evidence of some side agreement or side understanding other than that mentioned in the contract was inadmissible.

16. Damages — 178

Testimony of relatives of discharged employees was relevant to emotional distress allegedly suffered by employees as a result of employer's discharge of them shortly after they entered EEOC settlement agreement, since proof of existence of distress was critical to determination of employer's liability for negligent and intentional infliction of emotional distress.

17. Federal Civil Procedure — 2011

Testimony of experts, who failed to satisfy local court rule requiring an exchange of a short narrative statement of testimony expected to be elicited at trial and who instead provided defendant and court with only con-

clusory statement as to nature of proposed testimony, could properly be excluded. U.S.Dist.Ct.Rules C.D.Cal., Rule 9.4.6.

18. Customs and Usages — 10

In a negligent infliction of emotional distress case, industry custom or practice is relevant to determining the defendant's duty of care.

19. Federal Courts — 901

Exclusion of admissible evidence of employer's "unrelated" hirings, contradicting employer's claim that it was required to lay off employment discrimination plaintiffs due to its economic position, was not sufficiently prejudicial in itself to warrant reversal of dismissal of employees' Title VII claim in light of relatively weak nature of evidence. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

20. Federal Courts — 901

Employment discrimination plaintiffs who were allowed to bring out facts that they were the only blacks in their respective departments, the only employees with settlement agreements with the EEOC, and were laid off on the same day, were not prejudiced by mere exclusion of proposed commentary as to "statistical significance" of those facts.

21. Evidence — 373(1)

Employer's chief financial officer, who supervised payroll department and testified that termination clearance document at issue was prepared by personnel department and signed by department of finance, was a "qualified person" within the meaning of the foundation require-

ment of the business document exception to the hearsay rule. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

22. Civil Rights — 43

Testimony as to whether employer gave its own concerns and concerns of laid off employee equal consideration was properly ruled irrelevant in employment discrimination case. Fed.Rules. Evid.Rule 401, 28 U.S.C.A.

23. Federal Courts — 903

Employer's use of leading questions in its examination of its chief financial officer was not reversible error where testimony elicited through leading questions did not substantially expand or alter testimony elicited through proper, nonleading questions. Fed.Rules Evid.Rule 611(c), 28 U.S.C.A.

Tyron J. Sheppard, Los Angeles, Cal., for plaintiffs-appellants.

Andrew C. Peterson, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before FLETCHER, PREGERSON and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

Pamela Lewis and Diane Miller appeal the district court's dismissal of their Title VII claim alleging that Fairchild Industries discharged them in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC). They also appeal the district court's dismissal of their claims for the negligent

and intentional infliction of emotional distress, the directed verdict on their retaliation claims brought under 42 U.S.C. § 1981 and the California Fair Employment and Housing Act (CFEHA), and the directed verdict on their claims for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and fraud. Finally, they appeal a number of the district court's pretrial rulings and evidentiary rulings during trial. We affirm the directed verdict on the tortious breach claim, but reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud, Section 1981, and CFEHA claims. We remand for a new trial.[1]

BACKGROUND

Fairchild Control Systems, Inc., a division of Fairchild Industries, is primarily a government contractor. At the time of their discharge, Diane Miller worked for Fairchild as a contracts administrator and Pamela Lewis was employed as a junior designer. Both were the only black women in their respective positions.

Miller was first employed by Fairchild in 1974 as a clerk typist. In 1980, she was promoted to the non-clerical position of contracts administrator. Miller maintained a good relationship with her supervisor, Stan Peterson, until December 1981 when the work space for the Contracts Department was redesigned and Miller expressed dissatisfaction with the location of her new office. Shortly thereafter, Miller received a good overall performance

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[1]This matter is before this court for the second time. We previously reversed the district court's grant of summary judgment on all causes of action and remanded for trial. *See Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir.1986).

evaluation, but was denied a merit increase due to her record of absenteeism. After complaining to Supervisor Peterson and other Fairchild management personnel and receiving an unsatisfactory response, Miller filed an EEOC charge alleging race and sex discrimination.

Fairchild denied the discrimination charge, and the EEOC held a fact-finding conference on September 1, 1982. At that conference, Fairchild entered into a settlement agreement with Miller whereby Miller gave up her right to sue for discrimination under Title VII, and Fairchild promised to review the denial of Miller's merit increase and to provide Miller with training opportunities on an equal basis with similarly situated employees.[2]

Pamela Lewis began working in Fairchild's Engineering Department in 1979 as a draftsperson, and in 1981, she was promoted to junior designer. Lewis's supervisor, Glenn Ray, repeatedly denied her requests to take training courses, including classes to train on Fairchild's newly purchased computer-aided design and computer-aided manufacturing system (Cad/Cam). Lewis filed an EEOC charge of race and sex discrimination alleging that Ray denied her training opportunities provided to male Caucasian designers.

Fairchild denied the discrimination charge and the EEOC held a fact-finding conference on September 24, 1982. Fairchild entered into an agreement with Lewis in which it promised to transfer Lewis to a different supervisor within the Engineering Department, to allow Lewis to begin Cad/Cam training and to attend subsequent

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[2]Additionally, Fairchild promised to reaffirm its commitment to equal employment opportunity for all persons. Miller promised to check monthly with her supervisor to assure her absences were within acceptable limits.

courses, and to remove any negative materials from Lewis's personnel file. Lewis, for her part, waived her right to file a Title VII lawsuit for discrimination.

On November 5, 1982, less than two months after Miller and Lewis signed their settlement agreements with Fairchild, the company laid them off, citing economic reasons. Although other Fairchild employees were laid off at the same time, Miller was the only contracts administrator and Lewis was the only designer discharged.

On May 27, 1983, Miller and Lewis brought this action alleging that Fairchild discharged them in retaliation for filing EEOC complaints, in violation of (1) Title VII of the 1964 Civil Rights Act, (2) 42 U.S.C. § 1981 (Section 1981), and (3) the California Fair Employment and Housing Act (CFEHA). Miller and Lewis also allege that Fairchild breached the EEOC settlement agreements and the implied covenant of good faith and fair dealing, committed fraud, and intentionally or negligently inflicted serious emotional distress.

On November 26, 1984, the district court granted Fairchild's motion for summary judgment on all causes of action. This court reversed and remanded for trial after concluding that Miller and Lewis had presented triable factual issues on all claims. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir.1986).

In pretrial proceedings, the district court granted Fairchild's motion to bifurcate the trial on issues of liability and damages, dismissed the emotional distress claims as preempted by the California Workers Compensation Act, and ruled on Fairchild's eight motions in limine. Miller and Lewis appeal from the district court's pretrial rulings excluding parol evidence, determining the allocation of proof on the retaliation claims, dismissing

punitive damages as to their negligence and breach of contract claims, excluding the testimony of four lay witnesses, excluding the testimony of one expert witness, excluding statements regarding "statistical significance," and excluding evidence of hirings after their layoffs.

A three day jury trial commenced on May 5, 1987. The Title VII claim was tried to the court, and the remaining claims were tried to the jury. Miller and Lewis appeal four of the district court's evidentiary rulings during trial.

After both sides rested, the district court granted Fairchild's motion to dismiss appellants' Title VII retaliation claim under Fed.R.Civ.P. 41(b), and directed a verdict for Fairchild on the remaining claims under Fed. R.Civ.P. 50(a). The district court found that no reasonable jury could find in favor of Miller and Lewis based on the evidence presented.

DISCUSSION

I.
STANDARD OF REVIEW

We review the district court's involuntary dismissal of appellant's Title VII claim under the same standard applied to a judgment following a bench trial. *See Stone v. Millstein*, 804 F.2d 1434, 1437 (9th Cir.1986). The district court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. *Id.* We review for clear error the district court's factual finding that Lewis and Miller were not subject to discriminatory retaliation in violation of Title VII. *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir.1985).

We review de novo the propriety of the directed verdict on the remaining claims. *See Donoghue v. Orange County,*

848 F.2d 926, 932 (9th Cir.1988). We view the evidence in the light most favorable to the appellants, drawing all possible inferences in their favor, to determine if there is substantial evidence supporting a verdict for Miller and Lewis. *See Donoghue,* 848 F.2d at 932; *Lucas v. Bechtel Corp.,* 800 F.2d 839, 850 (9th Cir.1986). A directed verdict is proper when the evidence permits only one reasonable conclusion. *Donoghue,* 848 F.2d at 932.

We review the district court's pretrial dismissal of the emotional distress and the punitive damages claims de novo. *Fort Vancouver Plywood Co. v. United States,* 747 F.2d 547, 522 (9th Cir.1984). The district court's ruling with respect to parol evidence was based on the application of principles of contract interpretation and is reviewed de novo. *Miller v. Safeco Title Insurance Co., Inc.,* 758 F.2d 364, 367 (9th Cir.1985). We review the district court's evidentiary rulings and its decision to bifurcate the trial for an abuse of discretion. *Hirst v. Gertzen,* 676 F.2d 1252, 1261 (9th Cir.1982) (decision to bifurcate); *Kisor v. Johns-Manville Corp.,* 783 F.2d 1337, 1340 (9th Cir.1986) (evidentiary rulings).

II.
RETALIATORY DISCHARGE CLAIMS

Lewis and Miller allege that they were laid off by Fairchild in retaliation for filing charges with the EEOC in violation of Title VII, Section 1981 and the CFEHA.

Under Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), an employer may not retaliate against an employee for opposing discriminatory employment practices. *See Miller,* 797 F.2d at 730; *EEOC v. Crown Zellerbach Corp.,* 720 F.2d 1008, 1011 (9th Cir. 1983). Section 1981 provides an independent but overlapping federal remedy for intentional racial discrimination

in employment. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975); *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th Cir.1985), *amended by* 784 F.2d 1407 (9th Cir.1986). Because facts sufficient to give rise to a Title VII claim may also support a Section 1981 claim, an employee may seek relief for a retaliatory discharge under both provisions. *See Miller*, 797 F.2d at 733.[3] Finally, Cal.Gov't Code § 12940(f) (West Supp.1988) prohibits an employer from discharging an employee for engaging in protected activities under the CFEHA. *See Miller*, 797 F.2d at 733.

After the presentation of all evidence, the district court dismissed the Title VII claim and directed a defense verdict on the Section 1981 and CFEHA claims after finding that (1) Fairchild had presented "a strong and compelling case" that the discharges were "business necessit[ies]" and (2) Miller and Lewis had failed to present any evidence to show Fairchild's legitimate explanation was merely a pretext for retaliation. After a full trial on a retaliatory discharge claim, the trier of fact must decide whether the plaintiff has met her burden of showing that "the employment decision more likely than not was motivated by a discriminatory reason . . . [T]his burden is . . . carried if the plaintiff shows 'that the employer's proffered explanation is unworthy of credence' " *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S.

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[3] *See also Greenwood v. Ross*, 778 F.2d 448, 455 (8th Cir.1985) (Section 1981 establishes a substantive right to be free from retaliatory discharge); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir.1982) (Section 1981 encompasses retaliation claim based on an employer taking adverse action against an employee who filed an EEOC racial discrimination charge).

711, 718-19, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1982) (Blackmun, J., concurring).[4]

Fairchild presented substantial evidence supporting its explanation that Miller and Lewis, the least skilled employees in their respective departments, were laid off because Fairchild had a shrinking need for labor caused by an ongoing economic decline. Fairchild's former Finance Director, Jack Brucker, testified that from 1981 to 1983, the company experienced declining sales and peri-

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[4]The three stage order and allocation of proof for Title VII disparate treatment suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), governs actions for retaliatory discharge brought under Title VII, Section 1981, and the CFEHA. *See Sorosky v. Burroughs Corp.*, 826 F.2d 794, 803 (9th Cir.1987) (CFEHA age discrimination claim); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987) (Title VII retaliation claim); *Lowe*, 775 F.2d at 1010 (Section 1981 claim).

First, the plaintiff must establish a prima facie case of retaliation. *Yartzoff*, 809 F.2d at 1375; *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir.1984). The burden of production then shifts to the defendant-employer to articulate a legitimate, non-retaliatory explanation for the adverse employment action. *Yartzoff*, 809 F.2d at 1376; *Wrighten*, 726 F.2d at 1354. If the employer successfully rebuts the inference of retaliation, the burden of production shifts back to the plaintiff to show that the defendant's proffered explanation is merely a pretext for impermissible retaliation. *Yartzoff*, 809 F.2d at 1377; *Miller*, 797 F.2d at 731.

Since we are reviewing a retaliatory discharge claim after a full trial, however, the only relevant issue is whether the appellants met their burden of proving that a retaliatory reason more likely then not motivated Fairchild. *See Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.").

odic layoffs due primarily to the diminished needs of the Space Shuttle program.[5] In October 1982, after Congress failed to appropriate funds to build the fifth Space Shuttle, Fairchild management determined that additional layoffs were necessary because existing and anticipated contract budgets could not support the current staff. Brucker determined the number of employees to be cut from each department and, in compliance with Fairchild's stated procedure, department heads assessed the comparative skills of their members to determine which individuals should be laid off.[6] Lewis and Miller were selected for layoff because their supervisors allegedly determined they were the least skilled employees in their respective positions.

[1] Although we recognize that Fairchild presented substantial evidence in support of its explanation for the discharges, we conclude that the district court erred in finding that Miller and Lewis presented "absolutely no evidence of pretext." Moreover, the court erred in directing a defense verdict on the Section 1981 and CFEHA claims based upon finding that no reasonable juror could find retaliation. When the evidence is viewed in the light most favorable to Miller and Lewis, they

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[5]From 1981 to 1983, 143 employees ere laid off; 62 in 1981, 56 in 1982, and 22 in 1983.

[6]Fairchild's stated procedure for layoff selection is as follows:

> When it is determined that economic circumstances warrant a layoff, the company's staffing needs are determined with regard to matters such as numbers of employees needed, positions to be filled and skills required for those positions. Functional assignments are then made. Those employees to whom the company does not assign a position are laid off.

presented substantial evidence[7] that Fairchild's economic rationale was mere pretext and that Miller and Lewis were more likely laid off in retaliation for filing EEOC complaints. *See Donoghue*, 848 F.2d at 932 (standard for appellate review of directed verdict).

[2] First, to determine whether Fairchild's economic rationale was a pretext for retaliation, a jury could consider the timing of appellants' layoffs.[8] Miller was laid off only 59 days after she attended the EEOC fact-finding conference and signed the agreement with Fairchild; Lewis was laid off just 42 days after she signed her agreement. When Lewis was discharged, she had worked under her new supervisor for less than two weeks. A reasonable jury could infer that Lewis and Miller's filing of EEOC charges triggered their subsequent discharge.

[3] Second, a jury could infer retaliatory motivation from the evidence that the Fairchild management personnel who participated in the decisions to lay off Lewis and Miller were aware that the appellants had filed EEOC charges, had attended the EEOC fact-finding conference, and were the very people whose actions had prompted the appellants' complaints. Engineering Director Burns decided to lay off Lewis after he consulted with Supervisors

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[7]Substantial evidence necessary to defeat a directed verdict is defined as "more than a scintilla of evidence." *Lucas*, 800 F.2d at 850 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)).

[8]The district court concluded that the timing of the layoffs established the causation element of appellants' prima facie case. To show pretext, a plaintiff may rely on evidence offered to establish the prima facie case, as well as on other evidence and effective cross-examination of defense witnesses. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 1095 n. 10, 67 L.Ed.2d 207 (1981); *Miller*, 797 F.2d at 732.

Ray and Jones. Burns testified that he was aware of Lewis's discrimination charges, although he had not attended the EEOC fact-finding conference. Supervisor Ray's refusal to allow Lewis to attend training courses had induced Lewis to file her EEOC complaint. Ray attended the fact-finding conference where it was agreed that Lewis would be transferred to a new supervisor (Jones) and allowed to attend training courses. Moreover, Lewis testified to a history of communication problems with Supervisor Ray.

Burns testified that after consulting Ray, he selected Lewis because she was the least skilled and experienced member of the design group, and that Lewis's EEOC charges had no bearing on his decision. Lewis conceded that she was the least skilled designer, but she also testified that she had begun doing more advanced work under her new supervisor. Based on this evidence, a jury could question the credibility of Burns's testimony that Lewis's layoff was solely motivated by a neutral assessment of her skills. To establish retaliation, Lewis is required to show only that the filing of the EEOC complaint was *one of the reasons* for her discharge, and that but for filing the complaint, she would not have been laid off. *See Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir.1984).

Contracts Director Cassidy and Supervisor Peterson selected Miller as the one contracts administrator to be discharged. Both had attended the EEOC fact-finding conference where Miller's conflicts with Peterson (regarding work space and a deferred pay increase) were discussed. Miller testified that before filing her EEOC complaint, she had repeatedly complained to both Cassidy and Peterson.

At trial, Peterson testified that the layoff of one contracts administrator was necessary because there was a decline in the workload, and that Miller was selected because she was the least experienced employee and the only one unable to administer government contracts.[9] Although Miller admitted she was the least skilled contracts administrator, she also testified that she, as well as the other contracts administrators, had a very heavy workload at the time she was discharged. Based on this evidence, a jury could question whether the layoff of a contracts administrator was economically mandated and conclude that the selection of Lewis was motivated, at least in part, by retaliation.[10]

[4] Third, there was evidence that at the same time Miller and Lewis were discharged, four senior employees were transferred to delay or prevent the layoff of less skilled employees. A jury could infer that this procedure was not followed to protect Miller and Lewis because they had filed EEOC complaints. Indeed, Miller testified that when Supervisor Peterson informed her she was being laid off, she reminded him that she had clerical skills and would be willing to be transferred to another position to avoid layoff.

[5] Finally, Miller testified that after she learned of the layoff, George Morando, a manager in Fairchild's

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[9]Peterson testified, however, that if another contracts administrator had left voluntarily, he could have kept Miller on and trained her to administer government contracts.

[10]At least one Fairchild director was initially suspicious of Peterson's choice. Finance Director Brucker testified that when Peterson and Cassidy informed him that they had selected Miller for layoff, he told them it was a controversial decision and questioned them carefully to assure that the decision was based on her comparative lack of skills.

Engineering Department, told her she should not be surprised that she was discharged after signing the EEOC settlement agreement. Fairchild attempted to discredit this testimony by establishing that Morando resigned from Fairchild two months before he allegedly spoke to Miller because he was dissatisfied with his failure to advance in the company. Although this information could affect the jurors' evaluation of Morando's comment, they might still consider it as a former manager's representation of the attitudes of Fairchild's management.

Appellants' circumstantial evidence that Fairchild's economic rationale is mere pretext is not strong. Nevertheless, based on the evidence presented, a jury could reasonably find that it was not economically necessary to lay off these particular employees, and that Miller and Lewis were specifically selected in retaliation for filing EEOC charges. Although, after weighing the evidence and evaluating witness credibility, the jury might find that Miller and Lewis failed to prove retaliation, the district court erred in directing a defense verdict and precluding the jury from making this determination. *Cf. Yartzoff v. Thomas*, 809 F.2d 1371, 1377-78 (9th Cir. 1987) (summary judgment on retaliation claims inappropriate even though plaintiff-employee may not ultimately prevail at trial).

As a summary procedure, a directed verdict should be used judiciously, particularly in cases involving issues of motivation or intent. *Douglas v. Anderson*, 656 F.2d 528, 535 (9th Cir.1981). An employee's claim of retaliatory discharge requires a determination of an employer's true motivation, an elusive factual question which is difficult to ascertain and generally unsuitable for summary disposition. *See Miller*, 797 F.2d at 732-33; *Lowe*, 775 F.2d at

1008, 784 F.2d at 1407. A directed verdict is improper when there is conflicting testimony raising a question of witness credibility. *See Donoghue*, 848 F.2d at 932. Here, determining Fairchild's true reasons for discharging the appellants requires an evaluation of the credibility of the company managers who testified that they selected Miller and Lewis solely because of their lack of skills.

[6] We conclude that the district court erred in directing a defense verdict on the Section 1981 and the CFEHA claims; we reverse and remand for a new trial on those causes of action. We also vacate the Title VII judgment and remand for a new trial on the appellants' Title VII claim. The Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held that, where an employee brings an equitable discrimination claim (e.g., Title VII) and a legal discrimination claim (e.g., § 1981) against an employer based on the same facts, the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations in deciding the legal claim. *See, e.g., Roebuck v. Drexel University*, 852 F.2d 715, 737 (3d Cir.1988) ("with one possible exception, every circuit to have ruled on the issue has held that the jury's findings on a § 1981 claim are binding on the trial judge's resolution of a concurrently tried Title VII claim."); *Volk v. Coler*, 845 F.2d 1422, 1438 (7th Cir.1988) ("because the district court would have been bound by the jury's verdict on related issues, unless it set the jury verdict aside, and our decision reverses the §§ 1983 and 1985(3) claims, the judgment entered on all of the plaintiff's Title VII claims must also be reversed."); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 954-55 (2d Cir.1988); *Ward v. Texas Employment Commission*, 823 F.2d 907, 908-09 (5th Cir.1987); *Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir.1987); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir.1983). *See also*

Bouchet v. National Urban League, Inc., 730 F.2d 799,803-04 (D.D.C.1984) (then-circuit Judge Scalia observed that if the plaintiff, whose Title VII claim had been rejected by the district court after trial, were allowed to add common-law tort claims to her Title VII claims, then "[n]ot only would a jury trial on her tort claims be required, but the Title VII judgment — even if otherwise valid — would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury."). We view these holdings as consistent with Supreme Court precedent and the respect that properly is accorded to a jury verdict in our system of jurisprudence. *See Tull v. United States*, 481 U.S. 412, 425, 107 S.Ct. 1931, 1839, 95 L.Ed.2d 365 (1987) (citation omitted) (where there are "separate and distinct statutory provision[s]," one of which authorizes legal relief and one of which authorizes equitable relief, "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' "); *but see Lytle v. Household Manufacturing Co.*, 831 F.2d 1057 (4th Cir.1987) (unpublished disposition holding that a "district court's findings in [a] Title VII trial collaterally estop [a plaintiff] from relitigating these findings before a jury"), *cert. granted*,____U.S. ____, 109 S.Ct. 3239, 106 L.Ed.2d 587 (1989). Accordingly, we hold that, on remand, the district court in deciding the Title VII claim will be bound by all factual determinations made by the jury in deciding the Section 1981 and CFEHA claims.

III.
BREACH OF CONTRACT

Miller and Lewis allege that by discharging them within two months after they negotiated the EEOC settle-

ment agreements, Fairchild breached an implied term of the agreements that guaranteed Miller and Lewis continued employment for a reasonable period that would allow them to enjoy the benefits of Fairchild's promises.[11]

Under California law,[12] a contract must be interpreted to effectuate the mutual intention of the parties at the time of contracting, so far as that intention is ascertainable and lawful. Cal.Civil Code § 1636 (West 1985); *Jacobs v. Freeman*, 104 Cal.App.3d 177, 188, 163 Cal.Rptr. 680, 686 (1980). The existence of an implied contract or contractual term thus turns on the intent of the parties. " '[I]t must be determined, as a question of fact, whether the parties acted in such a manner as to provide the necessary foundation for [an implied contract], and evidence may be introduced to rebut the inference and show that there is another explanation for the conduct.' " *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 223, 765 P.2d 373, 385, (1988) (quoting *Silva v. Providence Hosp. of Oakland*, 14 Cal.2d 762, 764, 97 P.2d 798 (1939)).

[7] To ascertain the parties' intent, the district court properly admitted extrinsic evidence regarding the circumstances surrounding the agreements' formation. *See* Cal.Civil Code § 1647 (West 1985); *United States v. ITT*

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[11]Neither agreement expressly guaranteed Miller or Lewis continuing employment for any time period. Each agreement included a clause stating that the agreement constituted "the complete understanding" between the parties and the EEOC, and that "[n]o other promises or agreements shall be binding unless signed by these parties."

[12]In construing the settlement agreements at issue in this case, we apply principles of California contract law. *See Miller*, 797 F.2d at 733; *Ferguson v. Flying Tiger Line, Inc.*, 688 F.2d 1320, 1322 (9th Cir.1982).

Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975); *Miller,* 797 F.2d at 734-35; *Western Camps, Inc. v. Riverway Ranch Enterprises,* 70 Cal.App.3d 714, 722-23, 138 Cal.Rptr. 918, 923 (1977). However, the district court erroneously concluded that jurors could not reasonably infer from this evidence that the parties intended Fairchild to provide continued employment for a reasonable period.[13]

[8] Both women testified that a purpose of the settlement agreements was to enable them to improve their performance at Fairchild. Lewis and Miller relinquished valuable rights to file Title VII discrimination lawsuits against Fairchild in exchange for Fairchild's promise to provide them training which they needed in order to improve their skills and to advance in the company. A reasonable jury could find that Fairchild could not have meaningfully discharged this obligation unless Lewis and Miller remained employed for a reasonable period.[14] *See Marin County v. Assessment Appeals Bd.,* 64 Cal.App.3d

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[13]The district court's findings regarding the parties' intent, based on extrinsic evidence, are reviewable as findings of fact. *See Miller,* 758 F.2d at 367. We review the grant of a directed verdict to determine whether the jurors could have reasonably found in the appellants' favor. *See Donoghue,* 848 F.2d at 932.

[14]Although we need not define the outer limits of such a reasonable period, we conclude that a reasonable jury could find that it is longer than two months.

Because Lewis and Miller were laid off within two months of signing their agreements, a jury could find they did not fully receive the promised benefits. Lewis actually worked under her new supervisor for less than two weeks. She began the Cad/Cam training course before she was discharged and was able to continue for four months after her layoff. However, she was informed that she was ineligible to complete the 32 week course because she was no longer employed by Fairchild, and she was precluded from attending subsequent courses.

319, 328, 134 Cal.Rptr. 349, 355 (1976) (rejecting interpretation of contract whereby one party remains bound by contractual restrictions but is simultaneously deprived of the benefits of the bargain).

Both Lewis and Miller admitted that at the time of the EEOC conferences, they were aware of ongoing layoffs at Fairchild and were not explicitly promised layoff protection. However, both women testified that they did not ask for such protection at their conferences because they did not feel personally threatened by potential discharge.[15] Moreover, both women testified they believed the settlement agreement implicitly guaranteed them layoff protection.

A jury should evaluate the credibility of the appellants' assertions. *See Donoghue,* 848 F.2d at 932 (directed verdict improper when conflicting testimony raises a question of witness credibility). Based on the extrinsic evidence, viewed in the light most favorable to the appellants, a jury could reasonably find that the parties intended an implied covenant of continued employment. Thus, the district court erred in directing a verdict on the breach of contract claim. *See Id.*

Miller received her deferred merit increase for only one month before her discharge and never attended training courses.

[15]Lewis testified that just prior to the EEOC conference, Fairchild's Director of Administration and Security, Bob Friend, assured her that she would not be laid off. Friend disputed this and testified that he had no authority to make such a promise. Miller testified that she felt secure at Fairchild because of her heavy work load, transferable skills and support within the company.

IV.
TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Lewis and Miller allege that their retaliatory discharge within two months after negotiating the EEOC settlement agreements constituted a tortious breach of the implied covenant of good faith and fair dealing.

[9] We affirm the district court's directed verdict on the appellants' claim for tortious breach of the implied covenant of good faith and fair dealing. Under California law, "tort remedies are not available for breach of the implied covenant [of good faith and fair dealing] in an employment contract to employees who allege that they have been discharged in violation of the covenant." *Foley v. Interactive Data Corps,* 47 Cal.3d 654, 254 Cal.Rptr. 211, 239, 765 P.2d 373, 401 (1988). Although *Foley* was decided while this case was pending appeal, we follow *Foley* because "[a]bsent manifest justice . . . we generally apply the law as it exists when we render our decision." *Rubin v. Belo Broadcasting Corp.,* 769 F.2d 611, 614 (9th Cir.1985).

V.
FRAUD

Lewis and Miller allege that Fairchild fraudulently induced them to enter into the settlement agreements by concealing the fact that they were probable candidates for a future layoff and by making promises which Fairchild had no intention of performing.

To establish actual fraud under California law, the plaintiff must show that the defendant, with intent to deceive or induce the plaintiff to enter into a contract, (1) misrepresented a material fact, (2) suppressed facts

it knew or believed to be true, or (3) made a promise intending not to perform it. *See* Cal.Civil Code § 1572 (West 1982); *Miller,* 797 F.2d at 738 (applying California law). *Scofield v. State Bar,* 62 Cal.2d 624, 628, 401 P.2d 217, 219, 43 Cal.Rptr. 825, 827 (1965); *Jacobs,* 104 Cal.App.3d at 192, 163 Cal.Rptr. 680.

[10] Miller and Lewis presented evidence that when the parties negotiated the settlement agreements, Fairchild concealed the fact that Miller and Lewis would likely be laid off in the near future. The managers who represented Fairchild at the EEOC settlement conferences testified that when they attended the conferences in September 1982, they were aware of the company's ongoing economic decline and potential imminent layoffs, but did not specifically know that Miller and Lewis would be laid off in November. Ralph Bache, who attended both conferences as Fairchild's Personnel Director, admitted he knew there could be layoffs later that year when he signed both agreements on Fairchild's behalf, but did not inform Miller or Lewis of the potential layoffs.[16]

The Fairchild representatives also knew that Fairchild selected employees for layoff based on a comparative skills assessment and that Miller and Lewis were the least skilled individuals in their respective positions. A jury could reasonably infer, based on this information, that the managers knew or believed that Miller and Lewis were likely layoff candidates, and intentionally concealed this information at the settlement conferences.

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[16]Bache testified that at the end of Lewis's conference, he and Supervisor Ray told the EEOC representative that they might be back at the EEOC because of potential layoffs. Lewis was not present during this conversation.

The subsequent failure to perform a promise warrants an inference that the promisor did not intend to perform. *See Rambo v. Blain,* 263 Cal.App.2d 158, 163, 69 Cal.Rptr. 132, 135 (1968); *Boyd v. Bevilacqua,* 247 Cal.App.2d 272, 292, 55 Cal.Rptr. 610, 623-24 (1966). Here, Fairchild did not provide Miller and Lewis with promised training opportunities because it discharged them within two months after negotiating the agreements. This subsequent conduct coupled with the other evidence presented by Miller and Lewis could support a finding that Fairchild did not intend to perform its promises when it signed the agreements. *See Boyd,* 247 Cal.App.2d at 292, 55 Cal.Rptr. 610; *Tenzer v. Superscope, Inc.,* 39 Cal.3d 18, 216 Cal.Rptr. 130, 137 (1985).

Actual fraud is a question of fact involving determinations of intent and evaluations of credibility properly resolved by the jury. *See* Cal.Civil Code § 1574; *Jacobs,* 104 Cal.App.3d at 192, 163 Cal.Rptr. 680. Here, because jurors could have reasonably inferred that Fairchild fraudulently induced Miller and Lewis to enter into the settlement agreements, the district court erred in directing a verdict on appellants' fraud claim. *See Donoghue,* 848 F.2d at 932.

VI.
EMOTIONAL DISTRESS

[11] The district court dismissed the appellants' claims for intentional and negligent infliction of emotional distress, reasoning that they are precluded by California Worker's Compensation Act, Labor Code § 3600 et seq. (WCA). The latest California Supreme Court case on this issue is *Cole v. Fair Oaks Fire Protection Dist.,* 43 Cal.3d 148, 233 Cal.Rptr. 308, 729 P.2d 743 (1987). In *Cole,* the court held that the WCA precludes

civil suits only "when the essence of the wrong is personal physical injury or death." 233 Cal.Rptr. at 315, 729 P.2d at 750. The court reasoned that, since only physical injuries are compensable under the WCA, "unless an action were permitted in cases where there was no physical injury or disability, the employee would be left without any remedy whatsoever . . . " 233 Cal.Rptr. at 312, 729 P.2d at 747 (citation omitted). Since the appellants do not claim that any physical injuries or disabilities resulted from Fairchild's alleged misconduct, *Cole* establishes that their emotional distress claims are not precluded by the WCA.

Fairchild relies on the California Court of Appeals decision in *Hart v. National Mortgage & Land Co.,* 189 Cal.App.3d 1420, 235 Cal.Rptr. 68 (1987). In *Hart,* the court announced that "the time should and has come to cast aside the . . . 'physical versus emotional harm' approach in favor of another factor more logically connected to the workers compensation or suit-at-law choice. That factor is whether the acts complained of were a 'normal part of the employment relationship', or, whether the acts were incidents of the employment relationship." 235 Cal.Rptr. at 73 (citations omitted). Whatever the merit of this position, it is clear that the Court of Appeals in *Hart* lacked the authority to modify the test enunciated by the California Supreme Court in *Cole.*[17] In any event, the alleged misconduct in this case is certainly not a "normal part of the employment relationship." Miller and Lewis contend that they suffered emotional distress as a result

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[17]In *Cole,* the court held that whether the acts complained of were "a normal part of the employment relationship" is relevant in determining the availability of a civil suit only where the employee suffered *both* physical injury and emotional distress. *Cole,* 233 Cal.Rptr. at 315, 729 P.2d at 749.

of being laid off following settlement negotiations concerning their complaints of racial discrimination. In our view, this is not a "normal" pattern of events in the workplace, and no California court has characterized it as such. On the contrary, the court in *Hart* indicated that the California courts do not broadly construe the term "normal part of the employment relationship." *See Hart,* 235 Cal.Rptr. at 74 ("there can be little doubt" that sexual harassment by a manager toward a lower level employee is not "a normal part of employment").

VII.
PUNITIVE DAMAGES

[12] Miller and Lewis contend that the district court erred in dismissing the claim for punitive damages for breach of contract and for the negligent infliction of emotional distress.[18] The district court's ruling was correct with respect to the breach of contract claim. California law does not permit punitive damages for breach of contract. Section 3294(a) of the California Civil Code expressly provides that punitive damages are recoverable only for actions "not arising from contract." *See also Sawyer v. Bank of America,* 83 Cal.App.3d 135, 145 Cal.Rptr. 623, 626 (1978) ("the only supportable theory of liability was for breach of contract.... Hence, the award of punitive damages cannot be sustained").

[13] The district court erred in dismissing the appellants' punitive damages claim for the negligent infliction of emotional distress. In our previous opinion in this case, we noted that Miller's and Lewis's negligent infliction of

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[18]Miller and Lewis also seek punitive damages in their Section 1981, California Fair Employment and Housing Act and Fraud counts.

emotional distress claim "[p]resumably . . . does not refer to Fairchild's asserted retaliatory discharge [but rather to] Fairchild's act of negotiating settlement agreements and then laying off [Miller and Lewis] prior to their enjoyment of benefits implied under the contract." *Miller,* 797 F2d at 738. Miller's and Lewis's negligent infliction of emotional distress count clearly could be read as alleging that Fairchild consciously disregarded their contract rights when it laid them off. This count alleged (by incorporation) that Fairchild's acts were "willful, wanton, malicious and oppressive." Under California law, a defendant's "conscious disregard" of a plaintiff's rights justifies the award of punitive damages. *See* California Civil Code §§ 3294(a) and 3294(c) (punitive damages may be awarded where the defendant acted with "malice"; malicious conduct includes "conduct which is carried on by the defendant with conscious disregard of the rights or safety of others"). *See also Petersen v. Superior Court,* 31 Cal.3d 147, 181 Cal.Rptr. 784, 791, 642 P.2d 1305, 1312 (1982) ("the law in California ha[s] evolved in the area of punitive damages to the point where a finding of defendant's conscious disregard of the safety or rights of others w[ill] support an award of punitive damages"); *Silberg v. California Life Insurance Co.,* 11 Cal.3d 452, 113 Cal.Rptr. 711, 718, 521 P.2d 1103, 1110, (1974) ("to justify an award of exemplary damages, the defendant must . . . act . . . with conscious disregard of the plaintiff's rights"); *Roth v. Shell Oil Co.,* 185 Cal.App.2d 676, 8 Cal.Rptr. 514, 517-18 (1960) (in determining whether to uphold a punitive damage award, "[t]he only question is whether or not a jury might rightfully [have] dr[awn] an inference from the evidence produced that there was a conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship").

VIII.
BIFURCATION, PAROL EVIDENCE, AND EVIDENTIARY RULINGS

A. Bifurcation

[14] Miller and Lewis argue that the district court erred in bifurcating the trial of Fairchild's liability and damages. We suggest that the district court on remand reconsider its view that the possible savings in time justifies bifurcation in this case. The district court decided to bifurcate the trial after it had erroneously ruled that the emotional distress claims were precluded. On remand, Miller and Lewis's emotional distress claims presumably will be tried on their merits. In an intentional infliction of emotional distress claim, the issue of liability is intertwined with the issue of damages since the trier of fact can find liability only if it first finds that the plaintiff suffered severe emotional distress. *See Wallis v Superior Court,* 160 Cal.App.3d 1109, 207 Cal.Rptr. 123, 130 (1984) (outlining requirements for an intentional infliction of emotional distress action). Similarly, a finding of liability for negligent infliction of emotional distress is predicated on a finding of "serious emotional distress." *Molien v. Kaiser Foundation Hospitals,* 27 Cal.3d 916, 167 Cal.Rptr. 831, 839, 616 P.2d 813, 821, (1980) (en banc). An attempt to separate the trial of the liability and damages issues in this case would therefore tend to create "confusion and uncertainty." *Compare United Air Lines, Inc. v. Wiener,* 286 F.2d 302, 304 (9th Cir.1961) (bifurcation is improper where "[t]he question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty").

B. Parol Evidence

[15] Miller and Lewis argue that the district court erred in granting Fairchild's motion to exclude parol evidence. The district court recognized that "evidence of the surrounding circumstances [is] admissible to interpret the contract." The court ruled that "what is inadmissible will be any statement that there is some side agreement or some side understanding other than that mentioned in the contract." This ruling is consistent with established principles of California contract law. Both the agreement between Miller and Fairchild and the agreement between Lewis and Fairchild stated that "[t]his agreement constitutes the complete understanding [between the parties to the agreement]. No other promises or agreements shall be binding unless signed by these parties." Miller and Lewis do not argue that they misunderstood or were unaware of this language. Under these circumstances, it is reasonable to conclude that in both Miller's and Lewis's cases "the parties to [the] written agreement have agreed to it as an 'integration'— a complete and final embodiment of the terms of [the] agreement — [and] parol evidence [therefore] cannot be used to add to or vary its terms." *Marani v. Jackson,* 183 Cal.App.3d 695, 702, 228 Cal.Rptr. 518, 521 (1986) (citations omitted).

C. Exclusion of Lay Witnesses' Testimony

[16] The district court ruled that the testimony of four of Miller's and Lewis's relatives was irrelevant during the liability phase of the trial because it concerned only the emotional distress Miller and Lewis allegedly suffered as a result of Fairchild's actions. Since proof of the existence of distress is critical to the determination of Fairchild's liability for negligent and intentional inflic-

tion of emotional distress, the district court on remand should not exclude this evidence at the liability phase, whether or not it again chooses to bifurcate the trial of the liability and damages issues.

D. Exclusion of Expert Testimony

[17] Miller and Lewis contend that the district court erred in excluding the expert testimony of James W. Potts. Miller and Lewis apparently did not satisfy Local Rule 9.4.6's requirement of an exchange of a short narrative statement of the testimony expected to be elicited at trial, providing the defendant and the court only with the conclusory statements that the testimony would concern "[r]ecommended personal policies and procedures for California employers faced with reduction of staff" and would conclude that "[d]efendant's termination of plaintiffs was improper and unreasonable under the circumstances. Miller and Lewis provided no explanation of their failure to comply with Local Rule 9.4.6, and did not offer to comply when the district court heard the motion. Under these circumstances, the district court did not abuse its discretion in excluding the testimony in response to the appellants' noncompliance. *See Sealy, Inc. v. Living, Inc.*, 743 F.2d 1378, 1382-83 (9th Cir.1984) ("the district court may, in its discretion, exclude expert witnesses not disclosed in pretrial as required by local rules"); *Wirtz v. Hooper Homes Bureau Inc.*, 327 F.2d 939, (5th Cir.1964) (same). *See also Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir.1986) ("The trial court properly exercised its discretion in excluding [an] expert['s] testimony . . . because [the defendant] gave the plaintiffs no advance notice of the fact and substance of his expert testimony and therefore no opportunity to prepare to meet it").

The district court also excluded Potts's testimony because it concluded that the evidence would not be useful to the jury's deciding whether Fairchild terminated the appellants in retaliation for their complaints about racial discrimination.

[18] Since the district court earlier had dismissed the negligent infliction of emotional distress claims, it did not consider whether testimony about California employers' procedures regarding layoffs might be relevant in deciding whether Fairchild was negligent in laying Miller and Lewis off despite its alleged implied contractual obligations to them. In a negligent infliction of emotional distress case, industry custom or practice is relevant in determining the defendant's duty of care. *See Bullis v. Security Pacific National Bank,* 21 Cal.3d 801, 148 Cal.Rptr. 22, 25, 582 P.2d 109, 112 (1978) (under California law, "the custom in the community . . . is evidence to be considered in determining the proper standard of care"); 6 Witkin, *Summary of California Law*, § 754, at 93 (9th ed. 1988).

E. Exclusion of Evidence of Hirings and Admission of Evidence of Layoffs

Miller and Lewis challenge the district court's exclusion of evidence of hirings made by Fairchild after they were laid off. They also challenge the district court's admission of Fairchild's evidence of layoffs both proceeding and following their layoffs.

[19] The district court found that the appellants' evidence of hirings following their layoffs was admissible only with respect to "persons that [were] hired to perform tasks that the [appellants] were qualified to perform." The district court expressed concern that the jury might conclude from other evidence of hirings that

"Fairchild has a lot of money and they could hire these other people, they didn't have to let your people go." Nonetheless, the district court admitted Fairchild's evidence of layoffs in job categories *other than* those of the appellants which were made after the appellants' layoffs. The district court did not explain the relevance of such evidence,[19] but Fairchild concedes that it was presented to show "Fairchild's economic condition." In this evidence of "unrelated" layoffs was admissible in order to show that Fairchild's economic position was such that it was forced to reduce its workforce, we do not see why evidence of "unrelated" hirings should not be admissible to support the opposite suggestion about Fairchild's economic condition. Thus, we conclude that the district court abused its discretion in excluding the appellants' evidence of hirings. However, since evidence of unrelated hirings provides relatively weak support for the appellants' argument that Fairchild's economic condition was a mere pretext for their layoffs, we conclude that this exclusion was not sufficiently prejudicial to warrant reversal of the Title VII dismissal. *See Coursen v. A.H. Robins Co., Inc.,* 764 F.2d 1329, 1333 (9th Cir.1985) (evidentiary errors will not be reversed "absent some resulting prejudice"); *Hill v. Rolleri,* 615 F.2d 886, 890 (9th Cir.1980) (erroneous evidentiary ruling does not justify reversal if it did not have a "substantial" effect on any of the parties).

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[19]The district court explained that evidence of layoffs in unrelated job categories *before* the appellants' layoffs was relevant because "the longer layoffs were taking place . . . the more likely the [appellants] would have known about it, and that is one of the possible issues of the case."

F. Exclusion of Comments on "Statistical Significance"

[20] The district court ruled that Miller and Lewis could not argue the "statistical significance" of the fact that they were the only blacks in their respective departments, that they were the only employees with settlement agreements with the EEOC, and that they were laid off on the same day. The district court, however, ruled that Miller and Lewis could "bring [these facts] out and argue whatever [they] think the inferences are." Since the district court permitted Miller and Lewis to offer and argue this evidence, we do not find that they were in any way prejudiced by the mere exclusion of commentary as to "statistical significance."

G. Exclusion of Termination Clearance Form

[21] Miller and Lewis argue that the district court erred in admitting Exhibit 137 into evidence over their hearsay and foundation objections. Exhibit 137 is a termination clearance document. Fairchild apparently prepares a termination clearance document whenever an employee turns in his security badge. The appellants contend that the district court relied on Exhibit 137 to discredit Miller's testimony that a manager told her that she should expect to be laid off because she signed the EEOC settlement agreement. Miller and Lewis concede that Exhibit 137 might fall under Fed.R.Evid. 803(6)'s business document exception to hearsay, but argue that this exception's "foundation" requirement was not met in this case. Fed.R.Evid. 803(6) requires that a qualified person testify that it is the practice of the business to make the record and that the record is kept in the course of regularly conducted business activity. Miller and Lewis argue that Jack Brucker is not "a qualified person" within the meaning of Rule 803(6). Brucker testified that he is

Fairchild's Chief Financial Officer and exercises supervisory authority over the payroll department. He also testified that the termination clearance document at issue was prepared by the personnel department and signed by the Department of Finance, of which he was in charge. His testimony demonstrates that he is qualified within the meaning of Rule 803(6). The foundation requirement for Rule 803(6) "may be satisfied by the testimony of anyone who is familiar with the manner in which the document was prepared, even if he lacks firsthand knowledge of the matter reported, and even if he did not himself either prepare the record or even observe its preparation." 4 Louisell and Mueller, *Federal Evidence,* § 446, at 663-64 (1979) (footnotes omitted). Indeed, we have previously noted that " '[i]t is not [even] necessary that a sponsoring witness be employed by the business at the time of the making of each record.... [O]bjections, relating to the identity or competency of the actual preparer, may [be] relevant to the evidentiary weight or credibility of the documents, but [do] not [affect] their admissibility.' " *United States v. Smith,* 609 F.2d 1294, 1302 (9th Cir.1979) (quoting *United States v. Evans,* 572 F.2d 455, 490 (5th Cir.1978)).

H. Sustaining the Objection to a Question to Brucker

[22] Mitchell and Lewis argue that the district court erred in sustaining Fairchild's objection to the following question posed to Jack Brucker, "Did you give [Miller's] concerns as much consideration as Fairchild's at the time you decided that it was okay to go ahead and weather the controversy and lay her off?" The court sustained the objection on relevance. While the nature and extent of Fairchild's attention to Miller's "concerns" might be relevant to issues in the suit, Miller and Lewis have not shown the district court abused its discretion under

Rule 401 when it concluded that the precise question of whether Fairchild gave its own and Miller's concerns *equal* consideration is irrelevant. *See generally* Cleary, ed., *McCormick on Evidence,* at 546-47 (1984) (with respect to relevance, "[w]ise judges may come to differing conclusions in similar situations .... Accordingly, much leeway is given to trial judges").

I. Fairchild's Use of Leading Questions in its Examination of Jack Brucker

[23] Miller and Lewis contend that Fairchild improperly developed Jack Brucker's testimony through leading questions. After Brucker testified about relatively complex inventory practices, Fairchild's attorney in effect led Brucker through an extended hypothetical concerning these practices. During this portion of his testimony, Brucker did little more than repeatedly respond "right." The district court overruled Miller's and Lewis's objection at trial. It is not entirely clear that Fairchild's leading questions were necessary to develop Brucker's testimony. *See* Fed.R.Evid. 611(c) ("Leading questions should not be used on direct examination of a witness except as may be necessary to develop his testimony"); 3 Louisell and Mueller, *Federal Evidence* § 339, at 462-63 (1979) (Rule 611(c)'s "necessity" exception applies where a witness is very young, timid, ignorant, unresponsive, or infirm). However, Rule 611(c) vests broad discretion in trial courts, and we will therefore reverse on the basis of improper leading questions only if "the judge's action ... amounted to, or contributed to, the denial of a fair trial." Cleary, ed., *McCormick on Evidence,* at 12 (1984) (footnote omitted). *See also United States v. Tsui,* 646 F.2d 365, 369 (9th Cir.1981); *United States v. DeFiore,* 720 F.2d 757, 764 (2d Cir.1983) ("'[a]n almost total unwillingness to reverse for infractions [of the rule

against leading questions] has been manifested by appellate courts' ") (quoting Advisory Committee Note to Rule 611). Reversal on this basis would be inappropriate here because the testimony elicited through leading questions did not substantially expand or alter earlier testimony elicited through proper, non-leading questions.

IX.
CONCLUSION

We affirm the directed verdict on the claim for tortious breach of the implied covenant of good faith and fair dealing. We reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud. Section 1981 and CFEHA claims. We remand for a new trial.

California Employment Law Council's motion to file an amicus brief is granted.

AFFIRMED in part, REVERSED in part, and REMANDED.

No. 83-3509-JMI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIANA MILLER AND PAMELA LEWIS,
Plaintiffs,

vs.

FAIRCHILD INDUSTRIES, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This constitutes notice of entry as required by FRCP, Rule 77(d).

The trial in the instant action came before the Court and a jury, the Honorable James M. Ideman, United States District Judge presiding. All parties were represented by respective counsel of record. The trial has now concluded and the Court has thoroughly reviewed all oral and documentary evidence submitted herein. The Court now makes the following Findings of Fact and Conclusions of Law;

FINDINGS OF FACT

A. The Business of Fairchild, Its Financial Picture in 1982 and The On-Going Layoffs

1. Fairchild Control Systems, Inc. is a division of defendant Fairchild Industries, Inc., [hereinafter "Fairchild"]. It is primarily a government contractor for several major product lines.

2. In 1981, approximately fifty percent of its business involved the engineering and manufacture of parts for the

space shuttle. This work was performed pursuant to a contract with Rockwell International. At the time, approximately seventy five to eighty percent of Fairchild's work was government contract work, involving the Department of Defense, the Department of Energy, or similar work involving the National Aeronautics and Space Administration.[1]

3. The government contract work that Fairchild performed was highly regulated. Essentially, each such contract included specified costs for labor and/or materials which could not be exceeded without obtaining permission of the contracting agency. Once negotiated, the contracts were subject to internal audit, audited by the prime government contractor, and audited by the government.

4. Jack Brucker, Director of Finance and Administration, was responsible for reviewing manpower reports and projections for the company. On a monthly basis, he reviewed the number of contracts on hand, the number of employees on board and projected the number of manhours of labor that the contracts would support over the succeeding two to three months.

5. To monitor these contracts, and to insure the profitability of the company, a committee of executives made up of Anthony Petkelis, President, Brucker, C. K. Cassidy, Director of Manufacturing, Robert Burns, Director of Engineering, and the Director of Material would meet weekly. They reviewed the total budget of available hours for labor, which included hours expended performing the contracts, "incurred" hours, as well as the hours it was

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[1]Although NASA contracts are not government contracts, they are at least as highly regulated and involve the same skills and qualifications in order to administer. Therefore, NASA contracts are included in a reference to government contracts.

estimated that would be incurred to complete the contracts, estimates to complete [hereinafter "ETC"].[2]

6. As Fairchild approached the budget, contract by contract, it continually revaluated its ability to maintain persons on the payroll. To keep persons on the payroll without contracts to which their time could be assigned caused Fairchild to overrun costs, negatively impacting profitability. This reevaluation was accomplished when the executive committee reviewed the weekly reports, including the Program Status Report [hereinafter "PSR"]. The PSR broke down the various contracts by, *inter alia,* incurred hours and ETC. The committee then held a series of meetings with its various program managers to determine the needs for personnel with respect to each of their programs. There were twelve program managers involved.

7. During 1981, Fairchild ceased competing in the commercial aircraft interior market. Discontinuing this unprofitable product line decreased the need for personnel and increased Fairchild's dependence on government contracts.

8. At the time that Brucker joined Fairchild in March of 1982, Fairchild's sales had declined for several years in a row. This lack of sales was primarily due to a slowdown in the Space Shuttle program.

9. Throughout the summer of 1982, Fairchild, along with the other manufacturers of Space Shuttle hardware, were anticipating the award of a contract to build the fifth Shuttle. By the time the government's fiscal year began

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[2]These considerations were much more complex than described herein, given the committee's need to review outstanding proposals for new business, estimated time to complete changes to current contracts, and the like.

on October 1, Congress had failed to vote the funds to build the Shuttle, and no contracts were awarded.

10. Although Fairchild was experiencing financial difficulty in 1982, its Profit and Loss Statement for that year indicates that it made a profit. This indication of profit is an aberration caused by government required accounting methods. When the government purchases equipment from a contractor such as Fairchild, it requires the contractor to hold some of the money it receives in reserve to protect the government against defective product. Once the government is satisfied with its purchase, it releases that money to the contractor. The funds then show as profit received at the time of release, even though the contract which generated the profit has long since been completed. The profit referred to in the 1982 Fairchild P & L represents the release of moneys held in reserve and earned in prior fiscal years.

11. A result of the declining sales at Fairchild was a declining payroll. Thus, the following chart shows the number of employees laid off at Fairchild by quarter during the relevant time period:

Quarter	Total Number Laid Off[3]	Salaried Laid Off[4]
1st/1981	31	7
2nd/1981	12	2
3rd/1981	9	5
4th/1981	10	4
1st/1982	24	5
2nd/1982	2	1
3rd/1982	2	2
4th/1982	28	20
1st/1983	11	8
2nd/1983	10	1
3rd/1983	3	1
	142	56

12. Several facts are made apparent from the above data. There were on-going layoffs over a significant period of time that resulted in the termination of 142 employees.

13. The layoffs were well known by the remaining employees when they occurred; all witnesses that testified at the trial acknowledged their vulnerability to layoff.

14. The timing of the layoffs of salaried and exempt personnel, coming for the most part immediately after the October 1 beginning of the government's fiscal year, and the point in time when defendant's witnesses explained that they could no longer avoid terminating personnel that they were trying to retain, demonstrates that the

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[3]This includes all employees, those production employees covered by collective bargaining agreements as well as salaried and exempt employees.

[4]Miller and Lewis were salaried, non-bargaining unit employees.

timing of the layoffs of Miller and Lewis was unrelated to plaintiffs' protected activity.

B. The Facts Surrounding the Settlement of Lewis' EEOC Charge

15. Lewis, a black woman, began working in the engineering department of Fairchild in April 1979 as a draftsperson. Lewis was the only female draftsperson at that time; the other employees in her department were designers.

16. Lewis was promoted to the position of Junior Designer in 1981. There were no other junior designer positions in the company. The position was specifically created to provide her an opportunity for advancement.

17. At the time of her promotion to Junior Designer, Lewis' supervisor was Glenn Ray.

18. In late 1981, Fairchild investigated the feasibility of utilizing computer aided design and computer aided manufacturing [hereinafter "CAD/CAM"]. Fairchild subsequently purchased such a system from CALMA, which was installed approximately in February of 1982.

19. CALMA included in the purchase price for its equipment several training programs. The programs were designed to provide Fairchild with an opportunity to establish within its employee ranks the expertise necessary to effectively utilize the equipment.

20. Fairchild was entitled to have four persons attend a course on the basic operation of the system, called Design, Drafting and Manufacturing [hereinafter "DDM"], which consisted of a course on finite modeling, one on numerical control, one on Design Analysis Language (DAL) and one on systems management.

21. Lewis insisted that she attend these courses to enhance her qualifications and promotability. Lewis admitted at trial that she was not qualified to take these courses.

22. Ray, who was the Fairchild manager responsible for design and the operation of the CALMA system, attended each of the courses. Ray was responsible for learning the system so that he could manage the system and train the people operating it, and train others to use it.

23. The Systems Management Course was actually attended by two persons, Ray and a manager from Fairchild's Management Information or computer area, Martha Peslock. Fairchild had to purchase this additional training slot. This two week course was conducted in Northern California, requiring Fairchild to incur the costs of travel and lodging for those attending. Lewis was not qualified to attend this course. Moreover, Fairchild would not have gained anything by sending her to this course.

24. The DAL course was also conducted in Northern California and was also attended by Ray. Lewis was not qualified to attend this course either.

25. The course on numerical control was conducted in Northern California and attended by a member of Fairchild manufacturing management. Lewis was not qualified to attend this class.

26. The course on finite modeling was conducted in Northern California, was attended to Ray and two senior designers. Finite modeling involved complex solid as opposed to plane geometry. Lewis had not studied solid geometry, was not trained in three dimensional design, and admitted that she was not qualified to do finite

modeling. Obviously, Lewis was not qualified to attend this course.

27. The DDM course included the basic instruction for designers, among others, to use the equipment in their every day activities. Essentially, the course is an introduction to the system, to command syntax. Eventually it was hoped, a significant portion of the design work done at Fairchild would be done on the CALMA system.

28. There were many Fairchild employees, in manufacturing as well as design, that hoped to use the CAD/CAM system and, therefore, sought to attend the DDM course. Obviously, there was a need for Fairchild to train more than four persons. Fairchild initially determined that since its engineers would be the first and primary employees to use the CALMA system, they would be the only employees to attend the initial DDM courses. Therefore, only Ray and design engineers attended the training in Northern California.

29. Because of the need for additional training, Ray arranged with the Los Angeles Community College District to teach a DDM course at Fairchild's facility pursuant to the California Work Site Education and Training Act [hereinafter "CWETA"], Calif. Unemployment Ins. Code §§ 9900 *et seq,* repealed December 31, 1984. The course was developed by Ray during the summer of 1982, and was to be taught in the fall.

30. In addition to the CWETA CAD/CAM course, Ray persuaded CALMA to provide a self-study program that had been developed by the manufacturer, and which would allow a person to learn the system at one of defendant's work stations. Utilization of the self-study course, and access to the CALMA equipment was restricted to senior design and management personnel. The

restrictions were deemed necessary because of the priority placed by Fairchild on the training of these people, the damage that could be done to the equipment and/or software by untrained personnel, and because a person using the self-study course could cause the system to fail or "crash."

31. In early 1982 Lewis also asked to attend a blueprint training class that was being held to teach those unfamiliar with blueprints how to read them. The class, taught by Ray, was held during working hours with employees being paid for the time they attended the course.

32. Ray initially denied her request, pointing out that she already knew everything that was going to be taught in the class in that she not only read blueprints every day in her junior designer position, but actually drafted blueprints. She, along with two other black women, Roz Sowell and Jackie Watson, both of whom worked in Fairchild's duplicating room, insisted that they should be allowed to take the course. Ray relented, and agreed to allow all three to attend. Sowell and Watson took the course. Lewis, having obtained permission to attend, refused to take the course, explaining that she had instead decided to enroll in an electronics class at a local community college.

33. The testimony of both Ray and Lewis established that there was nothing that Lewis would have learned by attending the blueprint reading course that she did not already know as a result of her activities as a junior designer. Thus, there would have been no benefit to Fairchild to have Lewis attend the blueprint reading course.

34. Ray later denied Lewis' request to take the self-study computer course, but told her she could take it at a later date. He explained that the program was being used on a priority bases, and senior design personnel and engineers were to use it first. Ray's treatment of Lewis in this regard was unrelated to her race and/or protected activity.

35. At the time that Ray told Lewis that she was not eligible to take the self-study course, he also told her that she was not eligible to attend the CAD/CAM class because it was intended for senior design personnel and engineers.

36. At about the same time, Lewis asked to attend a three day training seminar on the Mitral Industrial Management System [hereinafter "MIMS"]. The training was conducted at an IBM facility on Wilshire in Los Angeles, and required the attender to lose three days work. MIMS is a computerized document control system used to keep track of various blueprints and other Fairchild documents and changes to those documents. Ray attended the training as he was the manager responsible for this activity. He was assigned this responsibility, and the training, by his superior.

37. The only other Fairchild employee to attend the training was Paul Gosche, who was the company's document control or records specialist, and had been for 15 years. He had to be trained on MIMS since he was to use the system every day as part of his assigned duties. There was no need to have anyone else trained. Moreover, the MIMS system related to Gosche's duties, which Lewis was not qualified to perform.

38. Ray denied permission for Lewis to attend the MIMS seminar as he and Gosche, were already scheduled

to attend and there was no economic benefit to the company to send Lewis.

39. Although Lewis was aware that the CAD/CAM DDM course to be taught by Ray was for senior design personnel, engineers and managers, she demanded that she be allowed to attend and to utilize the self-study program.

40. Lewis did not meet Fairchild's criteria for attending the CAD/CAM training course. There were more experienced and more qualified personnel that were legitimately assigned to receive the training instead of her. Therefore, Ray denied her enrollment.

41. Lewis complained about the decision to deny her enrollment in the CWETA CAD/CAM course to Fran Finston, Training Administrator, Ralph Bache, Director of Human Resources, and Burns.

42. Despite the fact that Lewis was not eligible for the CAD/CAM training, Burns arranged for Lewis to be enrolled. This resulted in the denial of this training to a more qualified and more experienced individual.

43. The decision to allow Lewis to attend the CAD/CAM course was made before Fairchild was put on notice that Lewis had filed a charge of discrimination with the EEOC.[5]

44. On August 17, 1982, Lewis filed a charge of race and sex discrimination with the EEOC alleging that Ray

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[5]Ray speculated that the decision was made prior to the charge having been filed. Lewis did not deny this, but did not directly testify about the sequence or timing of the two events. Whether the decision was made prior to the charge being filed or thereafter, the evidence was clear and unrebutted that the decision was made before Fairchild had any notice that Lewis' was filed the charge.

denied her training opportunities that were provided to male caucasian designers.

45. Fairchild responded to the charge, denying that Lewis had suffered any adverse employment decision because of either her race or sex.

46. An EEOC Fact Finding Conference was held on September 24, 1982 which was attended by Lewis, Bache, Ray and Blanche Hinke, Labor Relations Specialist. The Conference was conducted by Eileen Donnelly, an Equal Employment Opportunity Specialist [hereinafter "EOS"].

47. The purpose of the conference was to seek a mutually satisfactory resolution of the charge. In anticipation of the conference, Donnelly requested and obtained from Lewis what she would demand from a settlement with Fairchild.

48. At the conference, when all were present, Donnelly first had Lewis describe what it was that she was complaining about and why she felt it related to her race and sex. Donnelly then asked Fairchild to "give their side of the story." Bache, acting as the representative of Fairchild, presented the company's position.

49. The subject of layoffs was not discussed during the joint session.

50. Thereafter, Donnelly made an offer to settle the matter based upon the demands that Lewis had given her. One of those demands was that Lewis be transferred so that she could report to another supervisor, but while remaining within the Engineering Department.

51. Bache did not have the authority or the background to be able to respond to Donnelly's demand. Thus,

he called Robert Friend, then Assistant Director of Engineering.

52. Friend verified that such a transfer would be possible, and Bache related this to Donnelly.

53. Without there being a finding of discriminatory conduct or an admission of liability, Fairchild entered into a No-fault Settlement Agreement with Lewis and the EEOC on September 24, 1982. In exchange for Lewis waiving her right to file a lawsuit under Title VII, Fairchild agreed to Lewis' demands, which were the following:

> (a) Lewis would be transferred to a different supervisor;
>
> (b) She would remain in the Engineering Department;
>
> (c) She would begin CAD/CAM training on September 29, 1982 and attend subsequent courses; and
>
> (d) Any negative materials would be removed from her personnel file.

The Agreement stated that:

> "This agreement constitutes the complete understanding between the Respondent, Charging Party and the Equal Employment Opportunity Commission. No other promises or agreements shall be binding unless signed by these parties."

54. At some point toward the end of the Fact Finding Conference, Bache and Ray indicated to Donnelly that there was a possibility that they would be back before the EEOC because Lewis might possible be subject to the ongoing layoffs. They anticipated that if Lewis was laid off she would file another charge.

55. Lewis testified that she was satisfied with the terms of the settlement agreement; she had achieved what she had set out to achieve. She understood that Fairchild's total obligations to her after signing the settlement agreement were to pay her salary, provide her with training on the same terms as other employees, give her fair consideration for promotion, and "live up to the settlement."

56. Fairchild complied with the requirements of the No-fault Agreement. First, Lewis was transferred from Ray to a new supervisor, Jack Jones, and in the process remained in the Engineering Department.[6] Second she had already been enrolled in the CAD/CAM training course. Finally, all negative material was removed from Lewis' personnel file. There was no evidence adduced showing that any term of the No-fault Settlement Agreement with Lewis was violated.

57. Lewis was aware that there had been periodic layoffs at Fairchild. Lewis admitted that no one promised her immunity from layoff, before or after the No-fault Agreement was entered into.

C. The Facts Surrounding the Settlement of Miller's EEOC Charge

58. Miller, a black woman, began working at Fairchild in 1974 as a Clerk Typist. She subsequently was promoted

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[6]Lewis indicated that she wanted to be assigned to work under another individual, Bill Dickson. Actually, Dickson was the person to whom Ray and Jones reported, and did not have any non-managers reporting to him. It is undisputed that Jones was the only supervisor besides Ray that had design personnel reporting to him. Therefore, if Lewis was to remain in the Engineering Department as a designer under a supervisor other than Ray, there was no alternative to assigning her to Jones.

to Secretary and Senior Secretary, until she was assigned as a Senior Secretary in the Contracts Department.

59. In 1980, Miller was promoted to the position of Contracts Administrator. She was trained on-the-job by Stan Peterson, Manager of Contracts.

60. Miller's duties included reviewing and processing requests for parts pricing and parts overhaul, processing purchase orders for spare parts, and interfacing with customers with respect to these requests and purchase orders.

61. In December, 1981, Peterson and Cassidy designed new work areas for the department. The construction work was done while the employees were absent during the Christmas holidays. When Miller returned, she was unhappy with the size and location of her new office. She testified that her office was smaller than the other contract administrators' offices, although she could not describe how much smaller it was. She was dissatisfied with its location because she felt it was too close to the department's coffee pot, and she did not drink coffee.

62. The size and location of her office so upset Miller that she went home that day without performing any work. The next day she brought her husband to work, ostensibly to verify the undesirability of her location. However, both Peterson and Miller testified that her husband discussed the situation with Cassidy in an attempt to obtain for her a more desireable location.

63. About a month later, Miller learned that a performance review had been placed in her personnel folder before she was given an opportunity to review it. She had received a good over-all performance evaluation from Peterson, but a merit increase had been withheld because of her record of high absenteeism. Although she did not

dispute her record of absenteeism, Miller complained to Peterson and Cassidy that her increase should not have been withheld. Peterson told her the reason why she did not receive the increase and explained that the situation would be reviewed again in six months. Miller was not satisfied and complained further about the matter to Bache and Petkelis. They upheld the decision of Peterson and Cassidy.

64. On June 18, 1982, Miller filed a charge of discrimination with the EEOC alleging that she was discriminated against based upon her race and sex. She complained that she was threatened with discharge when she complained about her new office, that she was denied the opportunity to review her performance evaluation prior to it being placed in her personnel folder, and that she was denied a merit increase in salary because of excessive absenteeism when other employees who allegedly had sililar absence records received increases.

65. Fairchild responded to the charge, denying that Miller had suffered any adverse employment decision because of either her race or sex.

66. The EEOC held a Fact Finding Conference on September 1, 1982, conducted by an EOS other than Donnelly. The conference was attended by Miller, Bache, Peterson, and Cassidy.

67. The purpose of the conference was to seek a mutually satisfactory resolution of the charge.

68. At the conference, when all were present, the EOS first had Miller describe what it was that she was complaining about and why she felt it related to her race and sex. As in the case of Lewis, Fairchild was then asked to "give its side of the story." Bache, acting again as the

representative of Fairchild, presented the company's position. The subject of layoffs was not discussed.

69. Thereafter, the EOS made an offer to settle the matter based upon demands that Miller had given her.

70. Without a finding of discrimination or an admission of liability, Fairchild entered into a No-fault Agreement with Miller and the EEOC on September 7, 1982.

71. The Agreement provided that Miller would give up her right to sue under Title VII in exchange for Fairchild agreeing to the following demands of Miller:

> (a) Miller's attendance would be reviewed during September 1982 to determine if a merit increase could be effected on September 30, 1982;
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> (b) Miller could check monthly with her supervisor to determine if her absences were within acceptable limits;
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> (c) Miller would be given equal opportunity for training with similarly situated employees;
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> (d) Fairchild would reaffirm its commitment to equal employment opportunity for all persons; and
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> (e) That the terms of the agreement would remain confidential.

72. Miller's Agreement also included a provision stating:

> "This agreement constitutes the complete understanding between the Respondent, Charging Party and the Equal Employment Opportunity Commission. No other promises or agreements shall be binding unless signed by these parties."

73. Miller admitted at trial that the totality of the agreement between the parties was contained in the written No-fault Agreement.

74. Miller was aware that there had been periodic layoffs at Fairchild over the previous year or more. She testified that she was never told that her No-fault Agreement would have an impact on her risk of layoff.

75. There is no evidence that the provisions of the No-fault Agreement were not complied with. Miller's attendance was reviewed in September, and she was awarded a merit increase. No training opportunities arose while she remained with Fairchild.

D. Fairchild's Decision to Lay Off Plaintiffs

76. Sales continued to decline during 1982, they were dropping on a weekly basis. New government contracts simply were not being awarded. Thus, a large group of employees were laid off during May and June. However, the company remained optimistic that sales would improve, and that they would be awarded the Shuttle contract. Therefore, as the summer progressed, it retained as many of its employees as it could.

77. By September 30, prospects for the fifth Space Shuttle contract were not good at all, and Brucker came to the hard realization that Fairchild was going to run out of the contracted man-hours needed to support then current staff needs. He reviewed the reports, and during the first week of October met with the executive committee and the various project managers. After reviewing the work currently available to be performed, incurred hours, ETC, and anticipated new contracts, Brucker suggested to Petkelis that layoffs were necessary, and recommended the number of employees to be cut from each department.

78. Petkelis concurred, and directed his department heads to identify the skills and abilities that were required to perform the work on hand and the work that could be reasonably projected based on new contracts. Having identified the skills and qualifications needed to perform its contracts, the department heads were responsible to identify those positions that could be eliminated.

79. Fairchild did not have a system by which its employees who were not employed pursuant to a collectively bargained agreement would be laid off according to seniority. Non-bargaining unit employees did not have any rights to displace less senior employees.

80. Neither Miller nor Lewis were employed pursuant to a collective bargaining agreement.

81. Fairchild's criteria for selecting employees for layoff under the circumstances was as follows:

> "When it is determined that economic circumstances warrant a layoff, the company's staffing needs are determined with regard to matters such as numbers of employees needed, positions to be filled and skills required for those positions. Functional assignments are then made. Those employees to whom the company does not assign a position are laid off."

82. The department heads, having determined what positions had to be filled and what skills were required for those positions, looked to the skills and qualifications of individuals to fill the functional assignments that would remain after the layoff. They also determined if there were individuals that were planning to retire or quit, or if there was any new business of which the executive committee was unaware. If so, persons could be retained in such identified assignments, alleviating the need, in some

instances, for involuntary layoffs. Eventually, specific individuals were identified to be laid off.

83. Burns, as Director of Engineering and a participant in the committee, was involved in the October 1982 determination that there were more employees in the Engineering Department than the defendant had work available, and that a layoff was necessary. At that time, it was determined, among other things, that there was one too many employees in the design area. Burns was the department head responsible for identifying how the design area would be reduced by one.

84. Burns selected Lewis for layoff because she was the least experienced, least skilled employee in the design group. The evidence adduced by both plaintiffs and defendant is consistent in this regard. Indeed, Lewis admitted that she was not qualified to be a Designer, or to do higher level work than she was doing as the only Junior designer. She testified that she could not do complex design work or work involving military standards while, as far as she was able to tell, all of the other design employees could. The evidence is unrefuted that each of the people who remained were better able than Lewis to carry out the future needs of the department. Moreover, each of the remaining employees could perform all of the duties that Lewis was capable of performing, and they could also perform work which Lewis admitted she was not qualified to perform.

85. Burns was aware that Lewis had filed a charge with the EEOC, and had been employed when the No-fault Agreement had been negotiated.

86. There was no evidence that Lewis' charge, her No-fault Agreement or her protected activity played any part in Burn's decision to lay Lewis off.

87. The manager ultimately responsible for the contracts administration area of Fairchild was Brucker. He had personally identified this area as one requiring a reduction of one position and recommended this to Petkelis. Petkelis concurred in this recommendation and Brucker directed Peterson, through Cassidy, to identify how this could be accomplished. Peterson first asked the employees in his department whether any had plans to retire or leave, but none did. He then decided that Miller was the appropriate employee to lay off because she was the least experienced, least skilled contract administrator.

88. Miller admitted that she was the only administrator without experience managing government contracts. The administration of such constituted the overwhelming majority of Fairchild's contract work at the time. She also admitted that the remaining contract administrators were more skilled than she.

89. Miller complained that she should have been transferred to another job as a secretary or clerk, and someone else laid off. However, it was explained to Miller that Fairchild's salaried personnel did not have the right to displace other employees and that it was not obligated to terminate a clerical employee to make a place for her.

90. Peterson was aware that Miller had filed a charge with the EEOC, and was present during the negotiations that led to her No-fault Agreement.

91. There was no evidence that Miller's EEOC charge, No-fault Agreement or protected activity played any part in the decision by Peterson or Brucker to lay off Miller.

92. At the time that Bache represented Fairchild in neogitating the No-fault Agreements, he was aware that there had been, in the past, periodic layoffs of significant

numbers of employees and that future layoffs were possible. As far as Bache knew, no one, including himself, was immune to layoff. Bache, at the time, did not know that there would be further layoffs, and could he have known who, if anyone, would be laid off in the future.

93. Bache's total knowledge at the time of the Fact Finding Conferences was that there had been periodic layoffs, that business continued to be bad, and that there were rumors that some employees might be laid off before the end of the year.

94. At the time of the Fact Finding Conferences there was no evidence that anyone at Fairchild, managers as well as non-management employees, had any knowledge of potential layoffs, other than a general awareness that the company had economic problems that had already resulted in periodic layoffs.

95. No manager or employee of Fairchild could have known of a pending layoff at the time of the Fact Finding Conferences, as there were no decision to lay off additional employees between June and October, 1982. There was still hope that the Shuttle contract would be approved by Congress and that other work would materialize.

96. Therefore, there was no evidence presented of a failure on the part of Fairchild to disclose pertinent information to plaintiffs at the time the No-fault Agreements were reached, or at any other time.

E. Events After Plaintiffs' Layoff

97. Miller testified, for the first time at trial, that after she was told that she was being laid off on November 5, 1982, she encountered George Morando, a Project Manager in the Engineering Department. He purportedly

asked Miller why she seemed upset. Miller claims that when she explained that she had just been laid off he told her "you shouldn't be surprised, you should have known after signing the EEOC Settlement Agreement." This, she claims, is evidence that her layoff was in retaliation for filing the EEOC charge. However, the uncontradicted evidence is that Morando ended his employment with Fairchild on October 1, 1982, long before Miller was notified of her layoff.[7] Moreover, plaintiff testified during her deposition that Peterson was the only person with whom she discussed her layoff; Morando's name was never mentioned.[8]

98. Following her layoff, Lewis continued to participate in the CWETA CAD/CAM computer class offered at Fairchild. She remained in the course until about April 18, 1983, when she voluntarily quit the class.[9] At about this same time, but after she quit, the school notified her that she could no longer continue in the class because she

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[7]Mirando was terminated about September 15, however, he was provided an office and a secretary during his job search. Mirando's access to Fairchild's premises ceased when his clearance to enter the facility was revoked by security on October 1. After that date, Morando could not have been on the premises unescorted.

[8]Thus, for purposes of the Courts ruling on plaintiffs' Title VII count, Miller's testimony regarding this incident cannot be credited.

[9]Lewis insisted on cross examination that she was unable to continue the class because she was laid off. Only after being confronted with her own letter of resignation did she finally admit to having quit the course. This is but one instance of the plaintiffs' recurring attempts to stretch the truth to picture themselves as victims. Both Miller and Lewis were oblique and evasive. Their demeanor and responses to questions evinced a disregard for the truth and an attempt to represent the evidence in a manner calculated to be most helpful for their case. Lewis' testimony, for purposes of her Title VII claim, cannot be credited.

no longer met the Community College's eligibility requirements. One had to be an employee of Fairchild to take the course. Lewis admitted that at no time was she promised that she could continue to attend the CAD/CAM course, or any other training, after she was no longer employed by Fairchild.

99. On November 9, 1982, Miller filed a charge of discrimination with the EEOC and the California Department of Fair Employment and Housing claiming that she was terminated in retaliation for filing the previous EEOC charge.

100. On January 17, 1983, Lewis filed a charge of discrimination with the EEOC claiming that she was laid off in retaliation for filing the previous employment discrimination charge.

101. Neither retaliation charges was investigated by the EEOC as both plaintiffs requested Right to Sue letters from the EEOC and the DFEH and filed the instant lawsuit.

CONCLUSIONS OF LAW

A. Jurisdiction

1. Plaintiffs are citizens of the State of California and Fairchild is a Maryland corporation with its principal place of business in a state other than California. Thus, the Court has jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a)(1) for all causes of action.

2. In addition, there is federal question jurisdiction under 28 U.S.C. § 1331 with respect to the retaliation claims as they are brought pursuant to The Civil Rights

Act of 1866 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

3. The Court has pendant jurisdiction over the plaintiffs' state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, breach of the covenant of good faith and fair dealing, fraud and violation of the CFEHA.

4. The venue of this Court is properly invoked pursuant to 28 U.S.C. 1391(b) in that the claims arose within the Central Judicial District of California.

B. The Alleged Retaliation in Violation of Title VII

5. Plaintiffs claim that their selection for layoff was in retaliation for their filing discrimination complaints with the EEOC in violation of Title VII.

6. The allocation of proof by which an action for discriminatory treatment is to be determined is set forth in *McDonnell Douglas* and *Burdine*. In *Miller v. Fairchild*, the Ninth Circuit described the *McDonnell Douglas/Burdine* formula as applied to cases involving discriminatory retaliation as follows:

> "(1) First, plaintiff must establish a prima facie case of discriminatory retaliation by demonstrating that (a) she engaged in an activity protected under Title VII; (b) her employer subjected her to adverse employment actions; and (c) there was a causal link between the protected activity and the employer's action.
>
> "(2) If the plaintiff satisfies this initial burden, the employer is then obliged to *articulate*, but not prove a legitimate, non-retaliatory explanation for its actions.

> "(3) Once the employer satisfies this burden of articulating a legitimate reason for the actions it took with respect to the plaintiff, the plaintiff must then *prove* the stated reason is a pretext for intentional discrimination."

Miller v. Fairchild, 797 F.2d at 731.

7. Miller and Lewis have stated prima facie cases of retaliation with regard to their layoffs. Each established that she filed a discrimination charge with the EEOC, which constitutes a protected activity; Each subsequently was laid off from employment at Fairchild, an adverse employment action; and Each layoff occurred less than two months after she negotiated her No-fault Agreement.

8. Fairchild not only articulated a legitimate, nondiscriminatory reason for the layoffs, it proved without question that plaintiffs were laid off because they were the logical individuals to be laid off in the face of shrinking need for labor.

9. Everyone at Fairchild, including plaintiffs, knew that there had been periodic layoffs of personnel over a 2½ year period. Fairchild failed to obtain a major NASA contract for the fifth Space Shuttle, and sales were poor in other respects. Additional layoffs were clearly warranted to weather the financial circumstances in which Fairchild found itself. Thus, Fairchild legitimately looked where it could to eliminate expendable positions.

10. Plaintiffs' positions were logically selected in the cutbacks because plaintiffs were performing functions that could easily be assumed by others. On the other hand, plaintiffs were not capable of performing the duties of the other employees in their respective departments. Both plaintiffs were the least skilled, least experienced

employees in their departments, and could most easily be spared.

11. There is absolutely no evidentiary support for the proposition that plaintiffs were to be given special, preferential treatment. There is absolutely no evidence that plaintiffs were to be afforded protection from layoff.

12. In stark contrast to the overwhelming evidence of justification for laying off plaintiffs, Miller and Lewis have failed to present any evidence at all that the pursuit of their complaints of discrimination with EEOC had anything whatsoever to do with the layoff decisions. Nor did plaintiffs produce evidence from which a reasonable trier of fact could conclude that the reasons given by Fairchild for its actions were a pretext for unlawful retaliation.

13. The only facts that Miller introduced in an effort to establish that she was retaliated against were:

(a) That she was laid off less than two months after she, Fairchild and the EEOC entered into her No-fault Agreement;

(b) That Bache participated in the negotiation of the No-fault Agreement and was responsible for processing the paperwork to implement the layoff decision; and

(c) That her supervisor, Peterson, was aware of the terms of Miller's No-fault Agreement and participated in the decision to lay her off.

14. Similarly, the only facts that Lewis introduced to support her claim of retaliatory layoff were:

(a) That she was laid off less than two months after she, Fairchild and the EEOC entered into a No-fault Agreement;

(b) That Bache, a Fairchild manager, participated in the negotiation of the No-fault Agreement and was responsible for processing the paperwork to implement the layoff decision; and

(c) That her supervisor's superior, Burns, was aware of the terms of her No-fault Agreement and participated in the decision to lay her off.

15. These facts are of no consequence. While the proximity of time between plaintiffs' layoffs and the settling of their EEOC complaints satisfies their requirement to state a prima facie case of retaliation, without more it represents nothing but a rebuttable inference. The inference was more than rebutted by Fairchild's overwhelming evidence of justification. Moreover, the timing of the layoffs, and their proximity to the negotiation of the No-fault Agreement is explained by the timing of the decision making process itself. The timing with respect to the award of the Shuttle contract was dictated by Congress and the government's fiscal year beginning, October 1. This in turn, affected the timing of Fairchild's decision, in that October and November became the time when it was faced with the moment when it had to act with respect to layoffs.

16. Aside from this rebutted inference, plaintiffs have presented no evidence suggesting that anyone at Fairchild based their layoff decisions on the fact that plaintiffs filed discrimination complaints, or otherwise engaged in protected activities.

17. With respect to Bache, the only evidence establishes that he was *not* involved in choosing Miller or Lewis for layoff, but that his involvement in the layoff process was to insure that all required paperwork was completed and exit procedures complied with.

18. It is true that, at least Peterson, Burns and Brucker were aware of the plaintiffs' EEOC charges and settlements.[10] However, there was absolutely no evidence that plaintiffs' protected activity contributed to the layoff decisions. Fairchild did not deviate in any way from its legitimate, nondiscriminatory criteria or procedure for selecting employees for layoff. Plaintiffs offered no evidence that contradicted Fairchild's contention that plaintiffs were the least experienced and least skilled employees in their positions at Fairchild. Rather, plaintiffs' own testimony corroborated defendant's legitimate nondiscriminatory reasons for its actions.

19. Miller offers the alleged statement of Morando as evidence of Fairchild's retaliatory intent. However, assuming such a comment was made, it is insufficient to establish a nexus between Miller EEOC charge and her layoff. At most it is questionable speculation by a disgruntled, terminated employee, lacking any probative value. Nor is the statement evidence of pretext, as there is no evidence that Morando was speaking for, or could speak for Fairchild. Assuming it is some evidence of pretext, it pales in significance given the overwhelming evidence, admitted by plaintiffs, that they were the logical choices to be laid off in November 1982.

20. Thus, the Court finds (a) plaintiffs established a prima facia case of retaliation, (b) Fairchild articulated and proved overwhelmingly the significant legitimate, non-retaliatory reasons for the actions it took with re-

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[10]It is not clear whether Jones, Lewis' supervisor at the time of her layoff was aware of the charge. However, given the fact that Lewis was transferred to his supervision as part of the settlement of the charge as opposed to being transferred for some other business reason, leads to the inescapable conclusion that he too was aware of Lewis' protected activity.

spect to plaintiffs' employment, and (c) plaintiffs failed to prove that the articulated reasons for their layoffs were a pretext used to retaliate against them for engaging in activity protected by Title VII. Therefore, plaintiffs' cause of action for violation of Title VII of the Civil Rights Act is dismissed.

C. Retaliation Under Section 1981 and the California Fair Employment and Housing Act

21. The same burdens and allocations of proof that govern a Title VII claim apply to claims of retaliation under the Section 1981 and CFEHA. *Miller v. Fairchild,* 797 F.2d at 733 (§ 1981); *Lowe v. City of Monrovia,* 775 F.2d 998, 1010 (9th Cir. 1986) (same); *Robinson v. Hewlett-Packard Corp.,* 183 Cal.App.3d 1108, 228 Cal.Rptr. 591, 602 (1986) (CFEHA); *County of Alameda v. Fair Employment and Housing Commission,* 153 Cal.App.3d 499, 504, 200 Cal.Rptr. 381, 383 (1984) (same). *See also, Gay Law Students Associaiton v. Pacific Telephone & Telegraph Company Co.,* 24 Cal.3d 458, 490-91, 156 Cal.Rptr. 14, 34 (1979). Therefore, plaintiffs' Section 1981 and CFEHA claims are also dismissed.

22. Moreover, no reasonable jury could find, based on the evidence presented, that plaintiffs were retaliated against for engaging in protected activity. The evidence supporting Fairchild's justification for its actions was overwhelming and there was absolutely no evidence of pretext.

23. Therefore, verdicts are directed in defendant's favor on plaintiffs' causes of action for discriminatory retaliation under Section 1981 and the CFEHA.

D. The Alleged Breach of Contract Claims

24. Plaintiffs allege that their layoffs breached their No-fault Agreements. At the crux of their cases is the assertion that those Agreements include tacit pledges of preferential treatment by Fairchild, that plaintiffs would not be laid off until a reasonable period of time elapsed which would allow them to enjoy the benefits that they derived from their negotiations with Fairchild.

25. It is undisputed that the No-fault Agreements contain no explicit promise of continued employment for plaintiffs or immunity for them from layoff. However, plaintiffs' argue that such promises must be read into the Agreements in order to give them meaning.

26. Both No-fault Settlement Agreements state clearly:

> "This agreement constitutes the complete understanding between the Respondent, Charging Party and the Equal Opportunity Commission. *No other promises or agreements shall be binding unless signed by these parties.*" (emphasis added).

27. The Agreements on their face appear unambiguous, however the Ninth Circuit in *Miller v. Fairchild*, 797 F.2d at 734-35, suggested that there might be implied ambiguity arising from the circumstances in which the Agreements were negotiated. Thus, there was considerable testimony adduced at trial with respect to plaintiffs' understanding of those circumstances and the settlements.

28. The testimony confirmed conclusively that no provision for continued employment for plaintiffs was *intended* to be implied by the Agreements or could be implied from the Agreements. Rather, both plaintiffs admitted that they knew the risk of layoff existed at the

time of the negotiations and after the execution of the Agreements. The Agreements were negotiated at a time when periodic layoffs were occurring at Fairchild, and plaintiffs were well aware of that fact. Both plaintiffs admitted that they were never told that the No-fault Agreements had any impact on the risk that they might be laid off. And both plaintiffs testified that they were never told that they were immune from layoff, before or after the Agreements were signed.

29. Without any assurance by Fairchild of continuing employment, plaintiffs had no reason to expect continued employment. There was no evidence that either plaintiffs or Fairchild contemplated that the No-fault Agreements would provide a restriction as to plaintiffs' layoffs — much less a manifestation of mutual assent to such a restriction. Therefore, no reasonable juror could read into the language of the Agreements the promises suggested by plaintiffs.

30. If immunity from layoff was important to plaintiffs, they had an opportunity to address it either with their respective EOS or at their Fact Finding Conferences. The fact that they did not include such a demand along with the others that they made on Fairchild and which resulted in the settlement of their cases, is compelling evidence that the circumstances surrounding the negotiation and settlement of their EEOC charges did not create an implication of layoff immunity.

31. Plaintiffs have presented no evidence upon which reasonable jurors could conclude that Fairchild breached the No-fault Agreements when it laid plaintiffs off.[11]

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[11]Moreover, there was no evidence of breach of any express terms of the No-fault Agreements. While plaintiffs claim that Fairchild

Therefore, a verdict in defendant's favor is directed on plaintiffs' cause of action for breach of contract.

E. The Alleged Breach of the Covenant of Good Faith and Fair Dealing Implicit in the No-Fault Settlement Agreements

32. Under California law, a contract of employment contains an implied covenant of good faith and fair dealing.

33. To prove a breach of the implied covenant of good faith and fair dealing, plaintiffs must establish that the defendant's actions in laying them off were carried out without probable cause to believe the layoffs were justified by legitimate business reasons and in bad faith. An employer who acts in good faith on an honest but mistaken belief that the termination of an employee is warranted by a legitimate business reason has not breached the covenant. *Sawyer v. Bank of America,* 83 Cal.App.3d at 139 (1978) ("breach [of] an implied covenant of good faith and fair dealing consists [of] bad faith action, extraneous to the contract, [combined with the obligor's intent to] frustrate the obligee's enjoyment of contract rights."); *Shapiro v. Wells Fargo Realty Advisors,* 152 Cal.App.3d 467, 479, 199 Cal.Rptr. 613 (1984) (Wrongful termination; same); *Newfield v. Insurance Co. of the West,* 156 Cal.App.3d 440, 445, 203 Cal.Rptr. 9 (1984) (no claim for breach of covenant may be made in the absence of an enforceable contract; "[t]he courts have refused to recognize any such cause of action [for breach of the covenant] based on the naked covenant alone."); *Gibson v. Government Employees Insurance Co.,* 162 Cal.App.3d 441, 208 Cal.Rptr. 511 (1984) (covenant obligations limited to

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failed to notify the EEOC within ten days of satisfaction of its promises, there was no evidence presented of such a failure.

scope of underlying contractual obligations); *Rulon-Miller v. IBM Corp.,* 162 Cal.App.3d 241, 253, 208 Cal.Rptr. 542 (1984) ("an employer who acts in good faith on an honest but mistaken belief that discharge of an employee is required by legitimate business interests has not committed a wrongful discharge of the employee."); *Koehrer v. Superior Court (Oak Riverside Jurupa, Ltd.),* 181 Cal.App.3d 1155, 1171, 226 Cal.Rptr. 820 (1986) ("If the employer merely disputes his liability under the contract by asserting in good faith and with probable cause that good cause existed for discharge the implied covenant is not violated and the employer is not liable in tort.").

34. The obligations implied by the covenant are no more extensive than, and cannot contradict, the obligations within the underlying written agreements. *Gibson v. Gov't Employees Insurance Co.,* 162 Cal.App.3d at 445-46, 208 Cal.Rptr. at 514 (covenant obligations limited to scope of underlying contractual obligations); *Brandt v. Lockheed Missiles & Space Co., Inc.,* 154 Cal.App.3d 1124, 201 Cal.Rptr. 746 (1984) (covenant cannot change the express terms of a contract); *Egan v. Mutual of Omaha Insurance Co.,* 24 Cal.3d 809, 818, 69 Cal.Rptr. 691, 695 (1979), *cert. denied,* 445 U.S. 912, 100 S.Ct. 1271 (1980) ("duty imposed by such an implied promise will depend on the contractual purposes").

35. In the instant action the No-fault Agreements expressly state that they constitute the "complete understanding" between plaintiffs and Fairchild, and they make no provision for layoff exemption. Furthermore, there is no extrinsic evidence of an intent on the part of the parties that such a promise be implied by the provisions of the Agreements. Therefore, plaintiffs have not established that Fairchild denied them the benefits of their contract, nor that it breach the covenant.

36. Even if one assumed that plaintiffs had presented evidence that the No-fault Agreements included a promise of layoff immunity, to recover for tortious breach, plaintiffs must prove:

(a) Fairchild terminated plaintiffs in violation of this promise;

(b) Fairchild acted in bad faith with the intent to prevent plaintiffs from enjoying the benefit of this promise; and

(c) Fairchild had insufficient facts to lead it to a conclusion that the layoff of plaintiffs was based upon a legitimate business reason.

Koehrer v. Superior Court, 181 Cal.App.3d at 1170-71; *Khanna v. Microdata Corp.,* 170 Cal.App.3d 250, 263, 215 Cal.Rptr. 860 (1985); *Rulon-Miller v. IBM Corp.,* 162 Cal.App.3d at 253; *Gibson v. Gov't Employees Insurance Co., supra.; Malmstrom v. Kaiser Aluminum & Chemical Corp.,* 187 Cal.App.3d 299, 231 Cal.Rptr. 820 (1986).

37. Plaintiffs' allegations of a breach of the covenant of good faith and fair dealing implied in the No-fault Agreements parallel, to a certain extent, their breach of contract claims. That is, a promise of continued employment must be implied in the Agreements in order for the explicit promises therein to be meaningful, and that the promise was broken by the layoffs. They rely upon the alleged retaliation in order to establish the conduct extrinsic to the employment relationship necessary to establish a breach of the covenant.

38. For the same reasons plaintiffs are unable to establish a breach of the Agreements, they are unable to establish a violation of the covenant. First, plaintiffs did not show that there was any promise, express or implied, that they had a right to continued employment because

they filed and settled their EEOC claims. Moreover, they were unable to prove retaliation.

39. In addition, plaintiffs were unable to prove the requisite bad faith on the part of Fairchild. As already noted, Fairchild acted reasonably in the face of economic duress. It applied legitimate, rational, non-discriminatory criteria when selecting plaintiffs to be laid off.

40. The evidence presented at trial not only failed to show any bad faith on the part of Fairchild, it overwhelmingly established that Fairchild acted in good faith.

41. The evidence was conclusive, no reasonable juror could find that Fairchild breached the covenant. Thus, Fairchild's motion for a directed verdict is granted.

F. The Fraud Claims

42. To prevail on their claim that Fairchild engaged in fraud when it entered into the No-fault Agreements, plaintiffs must prove that:

(a) Fairchild knew or should have known prior to entering into the Agreements that plaintiffs were going to be laid off;

(b) Fairchild knowingly concealed the fact that plaintiffs were going to be laid off during the negotiations that resulted in the Agreements;

(c) Fairchild did not intend to honor the Agreements at the time they were made;

(d) The concealment was made with the intent to induce reliance on the part of plaintiffs;

(e) Plaintiffs justifiably relied on the misrepresentations of Fairchild; and

(f) Plaintiffs' reliance actually and proximately caused their damages.

Glovatorium, Inc. v. NCR Corp., 684 F.2d 658, 660 (9th Cir. 1982).

43. First, there was no evidence whatsoever that at the time of the negotiation and execution of the No-fault Agreements, Fairchild knew or should have known that plaintiffs were to be laid off. Thus, plaintiffs have failed to establish the first element of the cause of action.

44. Since Fairchild did not know at the time of the negotiations, and could not have known that plaintiffs were to be laid off, it could not have concealed this from plaintiffs. Fairchild concealed nothing from plaintiffs. Indeed, Bache and Ray, by expressing their concern to Donnelly about the possibility of a retaliation charge should Lewis be laid off raised the whole issue of the possibility of layoff rather than concealing it.

45. There was no evidence that Fairchild did not intend to abide by the terms of the Agreements. In fact, there was no evidence adduced at trial establishing that Fairchild did not honor any promise made to the plaintiffs in both No-fault Agreements.

46. No dishonest motive could be inferred from the settlement of the original EEOC charges given the trivialities which were involved.

47. Plaintiffs' own testimony *completely negates* their fraud claim. Miller testified that she knew of no facts which would support the assertion that Fairchild knew of her lay off at the time she entered into the Agreement. Lewis testified that she had no reason to believe that at the time the Agreement was signed, any of the promises made by Fairchild were false, or made with an intent to

deceive her. The testimony of both established conclusively that they were never misled about the possibility of layoff, they were well aware of that risk at the time they entered into their Agreements. Each admitted that there were no promises made regarding continued employment or immunity from layoff, and neither plaintiff was ever told that the No-fault Agreements would impact their risk of layoff.

48. No reasonable juror could find that plaintiffs were fraudulently induced to enter into the No-fault Agreements and Fairchild is granted a directed verdict in its favor on plaintiffs' cause of action for fraud.

G. Attorneys Fees

49. The Court, in its discretion, may award the prevailing party reasonable attorney's fees as part of the award of costs. Title VII provides that

> "In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."
> 42 U.S.C. § 2000e-5(k)

50. Section 1988 of the Civil Rights Attorney's Fees Awards Act of 1976 provides:

> "In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this Title, . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."
> 42 U.S.C. § 1988.

51. Similarly, the California Fair Employment and Housing Act provides that:

> "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorneys fees and costs." Cal. Gov't Code § 12965(b).

52. It is well established that when a plaintiff brings an unfounded or meritless civil rights claim, the prevailing defendant is entitled to recover its attorneys fees. *See, e.g., Christianburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412, 98 S.Ct. 694 (1978) (attorneys fees recovered by defendant in Title VII action); *Ellis v. Cassidy,* 625 F.2d 227 (9th Cir. 1980) (attorneys fees recovered by defendant under Section 1988); *Hardin v. White Mountain Apache Tribe,* 761 F.2d 1285 (9th Cir. 1985) (attorneys fees recovered by defendant). Fees may be awarded in a civil rights action to the prevailing party "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Christianburg,* 434 U.S. at 421.

53. Fairchild is the prevailing party in this action. By directing verdicts in defendant's favor on plaintiffs' discrimination claims, this Court has already determined that no reasonable person could find that Fairchild violated any of plaintiffs' rights.

54. Overwhelming evidence was presented that plaintiffs were laid off as a result of employee cutbacks resulting from the Company's economic circumstances. Much of this evidence was presented through plaintiffs' own witnesses. It is evident from testimony of both plaintiffs, as well as other witnesses presented by plaintiffs that they were selected for layoff because they were the least

qualified and therefore most expendable employees in their respective department.

55. It is evident that the plaintiffs had, early in this litigation, the full file of the Equal Employment Opportunity Commission, as well as Fairchild's explanation of the need for layoffs and the rationale for their terminations. Plaintiffs admitted in their depositions and at trial that they were the least experienced and least skilled employees in their departments, that they were the logical persons to be chosen for layoff within their respective departments. Thus, throughout this litigation, plaintiffs were aware, or should have been aware, that their contentions could not be sustained, that they could not prove the elements of their claims.

56. It is also evident, based on plaintiffs' complete failure to come forward with any evidence of pretext, that their pursuit of this case was frivolous, unreasonable and without foundation.

57. Because plaintiffs brought these baseless retaliatory discharge causes of action in their lawsuit, defendant was forced to incur substantial attorneys fees in defending these claims. Therefore, this Court awards Fairchild its attorneys fees in an amount to be determined by the Court in a subsequent proceeding.

DATED: July 9, 1987

/s/ JAMES M. IDEMAN

JAMES M. IDEMAN
United States District Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

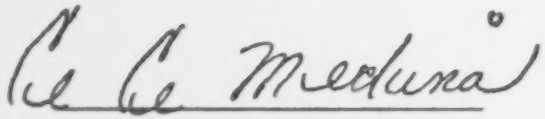
On December 18, 1989, I served the within Petition for Writ of Certiorari in re: "Fairchild Industries, Inc. vs. Diane Miller and Pamela Lewis" in the United States Supreme Court, October Term 1989 No. . . ., on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Tyron J. Sheppard, Esq.
Suite 1550
3550 Wilshire Boulevard
Los Angeles, CA 90010

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1989, at Los Angeles, California



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No. 89-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FAIRCHILD INDUSTRIES, INC.,
Petitioner,
vs.
DIANE MILLER and PAMELA LEWIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondents

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No. 89-1074

IN THE

Supreme Court of the United States

October Term, 1989

FAIRCHILD INDUSTRIES, INC.,
Petitioner,

vs.

DIANE MILLER and PAMELA LEWIS
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Diane Miller and Pamela Lewis respectfully pray that the petitioner Fairchild Industries, Inc.'s Petition for Writ of Certiorari be denied for the reasons set forth below.

STATEMENT OF THE CASE

In the fall of 1982, both respondents independently and unknown to each other signed settlement contracts with Fairchild. Respondents had sought the administative assistance of the Equal Employment Opportunity Commission (EEOC) to enforce the terms and conditions of their employment contracts with Fairchild.

Pursuant to the settlement contracts Fairchild agreed to provide previously denied training benefits over a period of time, along with other promises. Fairchild could not provide any of the promised benefits unless respondents remained employed. In return for Fairchild's promises, both respondents relinquished their right to sue Fairchild under Title VII (42 U.S.C. § 2000(e) et seq.)

Within weeks after each of the settlement contracts were signed, Fairchild fired each respondent without cause claiming economic reasons. None of the major contractual promises of Fairchild was executed prior to the firings.

REASONS FOR DENYING THE WRIT

I.

The Ninth Circuit decision on respondents' Section 1981[1/] claim does not conflict with (A) Patterson v. McLean Credit Union,[2/] (B) the decision of another Ninth Circuit panel or (C) the decision of other circuits.

A. The Ninth Circuit decision in this case is in harmony with Patterson.

[1/] 42 USC § 1981

[2/] 109 S.Ct. 2363 (1989)

In Patterson, the court was concerned with post-formation conduct which interferred with the right to enforce a contract through legal and administrative process. Retaliation has long been recognized by this and other pre-Patterson courts as a violation of Section 1981.

Patterson did not address or consider retaliation. The holding was focused on post-formation harassment. Implicit in the decision, however, was the assumption that the contract at issue was not tainted by unstated pre-formation intent which would nullify the mutual, good faith bargaining state of mind necessary for contract formation.

One who goes through the motions of preparing and signing a contract with a retaliatory motive to be carried

out in the future cannot be said to have "made a contract" if the effect of the retaliation removes all contract benefits from the aggrieved party. Such conduct is the equivalent of refusing to enter into a contract for retaliatory reasons.

Fairchild's swift retaliation in firing within weeks the only employees with executory settlement contracts negates any inference that Fairchild intended to be bound by its contract. In fact, the immediate termination of respondents proves that Fairchild itself did not believe the contracts existed.

The court did not intend the Patterson opinion to stand for the use of sham contracts to escape the reach of Section 1981. Patterson does not support the result Fairchild seeks. The

Ninth Circuit opinion should not be disturbed.

B. The full court considered Fairchild's petition for rehearing and the panel decision, without objection, thereby nullifying any argument of conflict within the Ninth Circuit.

Fairchild claims that this decision conflicts with the decision of another Ninth Circuit panel in Overby v. Chevron USA, Inc., 884 F.2d 470 (9th Cir. 1989). Even though Overby was decided two weeks before the filing of the amended opinion, and Patterson long before that, Fairchild never raised the Section 1981 issue. Fairchild cannot raise the issue now.

More important, however, is the last paragraph of the September 19, 1989, order.

> "The petitions for rehearing and suggestions for rehearing en banc and this order have been circulated to the full court. No member of the court has requested rehearing beyond the amendments provided in this order. Accordingly, the appellee's petition for rehearing and suggestion for rehearing en banc are denied." 3/

Since all members of the Ninth Circuit have considered the order without objection, there is no conflict.

Overby can also be distinguished on the facts. The protected activity in Overby occurred many years before the alleged retaliatory act. Plaintiff probably would not have prevailed on a retaliation theory pre-Patterson. Most

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3/ Miller v. Fairchild Order amending opinion published at 876 F.23 718, filed September 19, 1989. This Order is reproduced in its entirety in appendix 1a.

important, however, is the absence of a sham contract in Overby. Overby simply was not a winable retaliation case and cannot be compared to or set precedent for the case at bar.

C. The decisions of other circuits can also be distinguished on the facts.

Fairchild cites a number of cases from other circuits which appear to support their contentions. A close examination of each and every one will reveal a factual setting more closely related to the Ninth Circuit's Overby and not at all like the facts of this matter. For this reason, these cases are not persuasive authority for this matter nor can it be said that a split exists between circuits sufficient to support this writ.

II.

This Court's decision in Parklane Hosiery Co. v. Shore[4/] is not on point and cannot be precedent. The same is true of Lytle v. Household Manufacturing, Inc.[5/] Collateral estoppel cannot be used to prevent retrial of erroneously dismissed legal claims.

A. The decision in Parklane only applies when there are separate, distinct trials at different times. It does not apply to trials where similar claims both equitable and legal are tried in the same proceeding. All circuits are in accord on this issue.

[4/] 439 U.S. 322, 99 S.Ct. 645 (1979)

[5/] No. 86-1097, Slip Op. (4th Cir. 1987), cert. granted, 109 S.Ct. 3239 (1989)

B. In Lytle and other similar cases the Fourth Circuit has applied collateral estoppel as Fairchild asserts only in situations where plaintiffs have failed to prove a prima facie case. Even this narrow application is set for review by this court. In this matter all parties concede that respondents proved a prima facie case. Lytle, therefore, would not operate to bar retrial of this matter even in the Fourth Circuit. The outcome of this court's review of Lytle should not affect this matter.

CONCLUSION

Fairchild's retaliatory motive at the time of contracting with Respondents belies any assertion that it "made a contract" with Respondents.

Fairchild's non-contracting state of mind at the time of contract formation was clearly shown by the immediate firings. Firings which took place before Fairchild even began to perform its alleged contract "promises". This conduct is outlawed under Section 1981 and Patterson. There is no split among the circuits or within the Ninth Circuit on facts such as these.

Parklane does not apply to a single intergrated trial. Lytle was a case where plaintiff did not prove a prima facie case. The holding in Lytle or its resolution before this court should not impact the Ninth Circuit opinion in this matter.

Respondents respectfully request that the Court deny Fairchild's petition.

Respectfully submitted,

TYRON J. SHEPPARD
Attorney for Respondents

Dated: January 16, 1990

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE MILLER and PAMELA LEWIS,
Plaintiffs-Appellants.

v.

FAIRCHILD INDUSTRIES, INC., a Maryland Corporation,
Defendant-Appellee.

No. 87-6325

D.C. No. CV-83-3509-JMI

ORDER

Filed September 19, 1989

Before: Betty B. Fletcher, Harry Pregerson and William C. Canby, Jr., Circuit Judges.

ORDER

Appellants' petition for rehearing is granted to the following extent. The opinion, published at 876 F.2d 718, is amended as follows:

On page 721, the first paragraph is amended to read as follows:

Pamela Lewis and Diane Miller appeal the district court's dismissal of their Title VII claim alleging that Fairchild Industries discharged them in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC). They also appeal the district court's dismissal of their claims for the negligent and intentional infliction of emotional distress, the directed verdict on their retaliation claims brought under 42 U.S.C. § 1981 and the California Fair Employment and Housing Act (CFEHA), and

the directed verdict on their claims for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and fraud. Finally, they appeal a number of the district court's pretrial rulings and evidentiary rulings during trial. We affirm the directed verdict on the tortious breach claim, but reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud, Section 1981, and CFEHA claims. We remand for a new trial. [Footnote One remains at the end of this paragraph and in its current form.]

On page (726,) the last paragraph is amended to read as follows: (5421)

We conclude that the district court erred in directing a defense verdict on the Section 1981 and the CFEHA claims; we reverse and remand for a new trial on those causes of action. We also vacate the Title VII judgment and remand for a new trial on the appellants' Title VII claim. The Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held that, where an employee brings an equitable discrimination claim (e.g., Title VII) and a legal discrimination claim (e.g., § 1981) against an employer based on the same facts, the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations in deciding the legal claim. *See, e.g., Roebuck v. Drexel University,* 852 F.2d 715, 737 (3d Cir. 1988) ("with one possible exception, every circuit to have ruled on the issue has held that the jury's findings on a § 1981 claim are binding on the trial judge's resolution of a concurrently tried Title VII claim."); *Volk v. Coler,* 845 F.2d 1422, 1438 (7th Cir. 1988) ("because the district court would have been bound by the jury's verdict on related issues, unless it set the jury verdict aside, and our decision reverses the §§ 1983 and 1985(3) claims, the judgment entered on all of the plaintiff's Title VII claims must also be reversed."); *Wade v. Orange County Sheriff's Office,* 844 F.2d 951, 954-55 (2d Cir. 1988); *Ward v. Texas Employment Commission,* 823 F.2d 907, 908-09 (5th Cir. 1987); *Garza v. City*

of Omaha, 814 F.2d 553, 557 (8th Cir. 1987); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983). *See also Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803-04 (D.D.C. 1984) (then-circuit Judge Scalia observed that if the plaintiff, whose Title VII claim had been rejected by the district court after trial, were allowed to add common-law tort claims to her Title VII claims, then "[n]ot only would a jury trial on her tort claims be required, but the Title VII judgment — even if otherwise valid — would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury."). We view these holdings as consistent with Supreme Court precedent and the respect that properly is accorded to a jury verdict in our system of jurisprudence. *See Tull v. United States*, 481 U.S. 412, 425 (1987) (citation omitted) (where there are "separate and distinct statutory provision[s]," one of which authorizes legal relief and one of which authorizes equitable relief, "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' "); *but see Lytle v. Household Manufacturing Co.*, 831 F.2d 1057 (4th Cir. 1987) (unpublished disposition holding that a "district court's findings in [a] Title VII trial collaterally estop [a plaintiff] from relitigating these findings before a jury"), *cert. granted*, 109 S.Ct. 3239 (1989). Accordingly, we hold that, on remand, the district court in deciding the Title VII claim will be bound by all factual determinations made by the jury in deciding the Section 1981 and CFEHA claims.

On page (729,) the second full paragraph is amended to read as follows: (5425)

The subsequent failure to perform a promise warrants an inference that the promisor did not intend to perform. *See Rambo v. Blain*, 263 Cal. App. 2d 158, 163, 69 Cal. Rptr. 132, 135 (1968); *Boyd v. Bevilacqua*, 247 Cal. App. 2d 272, 292, 55 Cal. Rptr. 610, 623-24 (1966). Here, Fairchild did not provide Miller and Lewis with promised training opportunities

because it discharged them within two months after negotiating the agreements. This subsequent conduct coupled with the other evidence presented by Miller and Lewis could support a finding that Fairchild did not intend to perform its promises when it signed the agreements. *See Boyd*, 247 Cal. App. 2d at 292; *Tenzer v. Superscope, Inc.*, 39 Cal.3d 18, 216 Cal.Rptr. 130, 137 (1985).

On page 734, the last paragraph is amended to read as follows: (5436)

We affirm the directed verdict on the claim for tortious breach of the implied covenant of good faith and fair dealing. We reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud. Section 1981 and CFEHA claims. We remand for a new trial.

California Employment Law Council's motion to file an amicus brief is granted.

The petitions for rehearing and suggestions for rehearing en banc and this order have been circulated to the full court. No member of the court has requested rehearing beyond the amendments provided in this order. Accordingly, the appellee's petition for rehearing and suggestion of rehearing en banc are denied.

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